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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: August 17, 2009

Date of Order: October 06, 2009

+OMP No.631/2007

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06.10.2009

N.D.M.C.

.... Petitioner

Through : Ms. Kanika Agnihotri &
Mr. Vaibhav Agnihotri, Advs.

Versus

SMT. MANJU MAINI

... Respondent

Through: Mr. P.P.Khurana, Sr. adv. with
Ms. Seema Pandey, Adv.

JUSTICE SHIV NARAYAN DHINGRA

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| 1. | Whether reporters of local papers may be allowed to see the judgment? | Yes. |
| 2. | To be referred to the reporter or not? | Yes. |
| 3. | Whether judgment should be reported in Digest? | Yes. |

JUDGMENT

1. By this petition under Section 34 of the Arbitration and Conciliation Act, 1996 petitioner has assailed an award dated 23rd July, 2007 passed by the sole Arbitrator allowing various claims of the respondent.

2. Brief facts relevant for purpose of deciding this petition are that the respondent took part in tendering of three parking sites namely INA Market, Pandara Road Market and Sarojini Nagar Market. She being the highest bidder was allotted Pandara Road-Group B parking at monthly license fee of Rs.1,01,000/-, INA Market-Group A parking at monthly license fee of Rs.2,01,000/- and behind Delhi Public Library Sarojini Nagar Market-Group B parking site at monthly license

fee of Rs.2,51,000/-. The respondent had made security deposit as per the terms of tender for the three parking sites. After being a successful bidder, the respondent was handed over possession of three parking sites on 20th September, 2004. Soon after the parking sites were handed over, the respondent wrote letter to the petitioner regarding difficulties being faced by her at the parking sites. Her one letter is of 8th October, 2004 wherein she stated that the shopkeepers were protesting and not prepared to pay parking fee and her employees working there were not able to collect parking fee due to regular interference of the market shopkeepers. On 7th October, 2004 shopkeepers told her employees to run away from the parking. She made this complaint in respect of INA Market and Sarojini Nagar Market. She wanted NDMC to intervene and negotiate with the shopkeepers. She also wrote a complaint against the shopkeepers to SHO on the same day. She sent another complaint on 13th October, 2004 saying that the market traders were not paying the parking charges as fixed by NDMC. She also stated that some garbage was still lying in the parking sites. She being a lady could not involve herself in the fight. She wanted NDMC staff should be detailed to remove unauthorized parking and complained that NDMC staff had not been detailed by NDMC for ensuring that unauthorized parking was not done. She stated in case NDMC was unable to stop the INA Market traders and Sarojini Nagar Market traders from unauthorized parking, her deposit be refunded.

3. On 22nd September, 2004 and 24th September, 2004, i.e., soon after the allotment of the sites, she had complained to NDMC that the barriers at entry and exit had not been provided by the NDMC and they should be provided by NDMC and NDMC should also provide car lifting cranes so that cars can be removed from no-parking area. NDMC should provide light, water connection and sign boards in the parking site and should also provide boundary walls around the parking area. She stated that in case instructions were not issued by NDMC for these issues at the earliest, NDMC would be responsible to non-payment of license fee by her. By another letter dated 1st November, 2004 she again complained about the market people not using the parking space and having encroached upon the part of the parking areas. She wanted NDMC to take action against the shopkeepers who fight with her instead of giving her parking charges. Otherwise, she wanted that her amount should be refunded. She wrote a similar letter on 23rd November, 2004. She simultaneously did not pay the license fee of the parking sites to NDMC on these grounds. In the meanwhile NDMC allotted a separate parking space of 50 cars to Sarojini Nagar Market Association at payment of Rs.150/- per vehicle per month as Sarojini Nagar Market Association had represented to NDMC for allotting a parking site.

4. Since the respondent had not been paying license fee, a notice dated 4th December, 2004 was issued to the respondent by the petitioner asking the respondent as to why her license be not cancelled for not making the payment of license fee. She was told to make the

payment of due license fee of the parking sites immediately to avoid revoking of the license. The respondent still did not pay the license fee and ultimately the licenses were revoked.

5. The respondent invoked the arbitration clause seeking refund of security and claiming damages for loss of profit, thus raising a total claim of Rs.88,89,160/- against the petitioner on the ground that termination of parking site contracts was illegal and arbitrary and NDMC was obliged to see to it that the shopkeepers and the others should have paid her parking charges. She was not liable to pay license fee if she was not able to collect the parking charges. The petitioner had also lodged a counter claim against the respondent to the tune of Rs.9,29,002/-.

6. The learned Arbitrator came to conclusion that the notice given to the respondent before termination of contracts was highly inadequate. In case of Pandara Road parking site, there was gap of only 2 days between the date of show-cause notice and issue of termination order and in case of other two parking sites also, the gap between the notice and the termination order was not sufficient. He observed that petitioner should have first given a decision on the issue whether at that time, the payment of license fee by the respondent was must in view of the complaints lodged by the respondent. He therefore concluded that the termination order was not as per law.

7. The learned Arbitrator also framed an issue whether the punishment to those who were not paying parking charges could be vested in the contractor and came to conclusion that the contractor

was not a member of the Government body and had no power to punish. The authority to levy and collect the parking fee given to the respondent was in fact ineffective. NDMC was supposed to perform supportive role and NDMC should have made provisions for cranes to tow away the vehicles from non-parking areas. He framed another issue whether unauthorized parking areas existed near the said three parking lots and then relying on Hindustan Times cutting of 16th May, 2004 he concluded that even during the time when award was being made such area existed and were found by him on his surprise visit to said parking lots and there were many vehicles parked in non-parking areas and other vacant land near the parking site.

8. He also considered the effect of allotting a separate parking lot to shopkeepers of Sarojini Nagar Market for 50 cars. He held that allotment of parking site to shopkeepers resulted in substantial loss of revenue to the contractor as the parking fee fixed by NDMC for the separate parking lot allotted to the shopkeepers was only Rs.150 per month per car whereas the parking charges for the shopkeepers in the parking lot was Rs.1,000/- per month per car. He calculated loss of Rs.4 lakhs per month for Sarojini Nagar Market area.

9. He also held that there was an obligation on the part of NDMC towards the respondent and NDMC was obliged to remove the grievance expressed by the respondent verbally as well as in her letters since the NDMC had fixed the parking charges for the vehicles. The Arbitrator concluded if NDMC had a right to fix the parking rate then there was a duty on the NDMC official to ensure that the parking

fee was paid by all those who were parking their vehicles inside the parking lot and there was no possibility to avoid the payment.

10. The learned Arbitrator observed that the law of land has given a right to every aggrieved party to seek damages for loss suffered by them. He held that though the claimant claimed business loss for the entire license period but she was entitled to loss suffered by her for the period of 74 days for which she ran the parking lots. The Arbitrator allowed following claims of the respondent/claimant:

1. Refund of Rs.29,90,000/- with a 9% interest + Rs.5,50,000/- as compensation of loss suffered during 74 days along with interest @ 9% + Rs.70,000/- as the cost of arbitration along with interest of 9%.

11. The award is assailed by the petitioner that the learned Arbitrator failed to appreciate that claim of the claimant was hopelessly barred by limitation. The claimant under the contract could have filed a claim only within 90 days of the arising of cause of action but the claim was filed much beyond the period of limitation provided under the contract. It is also submitted that the award was contrary to the contract between the parties. There was no obligation on the part of the petitioner to collect parking fee for the claimant qua the vehicles parked in the parking area. The Arbitrator erred in holding that the petitioner had responsibility of providing help or aid to the respondent for collecting parking fee. The Arbitrator also acted contrary to contract in holding that adequate notice was not given for cancellation of license and the cancellation was illegal. It is submitted that under

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the contract no notice was required to be given for cancellation of license in case of breach of terms and conditions especially in case of non-payment of license fee. It is also submitted that the parking sites were auctioned through open tender on “as is where is basis” and the contracts specifically provided this. The Arbitrator ignored all the terms and conditions of the contracts on strange reasoning. It is submitted that operation and management of parking lots was to be with the contractor and NDMC had not to help the contractor either in recovery of parking fee or in management or operation of the parking sites. It is submitted that the award was in total disregard to the terms and conditions of the contract and was not tenable. It is also submitted that the claimant had repeatedly written to the respondent to terminate her tender and to take back the possession of the parking sites as she was not in a position to run the parking lots. Still the Arbitrator held that the termination was illegal.

12. The award given by the learned Arbitrator shows that the Arbitrator not only did not care for the contract between the parties but he far exceeded the jurisdiction and did not adjudicate the dispute between the parties on the basis of commercial transactions as entered into between the parties. The learned Arbitrator was himself as much bound by the terms of the contract between the parties as the parties themselves.

13. Notice inviting tenders specifically provided as under:-

“5a) Tenders/Applicants are advised in their own interest to visit and see the parking lots in question.

5d) The allotment shall be made purely on ‘as is where is’ based and no representation on any account, whatsoever, shall be entertained in this regard.

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12. The contractor must make payment of licence fee in advance every month in cash or by cheque (good for payment) or Bank Draft. In the event of failure to make the payment in advance by the 7th of every month, the contractor shall be liable to pay simple interest on the amount due @ 24% per annum for the delay in the payment. If contractor fails to make the payment for one more month then the license shall be deemed to have been automatically terminated and possession shall be deemed to be of the NDMC.

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14. The New Delhi Municipal Council shall supply a pattern for the parking of cars/scooters including inlet and exit for cars/scooters and the same will be parked according to the pattern.

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18. If the payment is not made for a period of two months the agreement shall automatically stand cancelled after two months of default and the security deposit shall be forfeited.

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23. The Contractor shall be responsible for maintaining the cleanliness of the areas by ensuring that all the garbage are put into dustbin within the parking lot.

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25. The contractor shall manage the parking of vehicles himself or through his employees. He shall not sublet or allow any other persons to run the car/scooter parking on his behalf, failing which, the contract will be liable for cancelation and amount of security deposit will be forfeited.

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31. The contractor shall not interfere with the work of construction by the NDMC of any drain, pipe or cable,

etc. and shall make good at his own cost damage which he may cause to such works to the entire satisfaction of the NDMC.

32. The parking lot which becomes non-operational during the period of contract of laying down cables/sewer lines/construction work undertaken by NDMC or any other agency with the permission of NDMC and also due to security reasons will be allowed refund of license fee on pra-rata basis after confirmation from the regulatory authority. Likewise the area already occupied by the DMRC if vacated later on shall be added in the existing parking lot and accordingly license fee shall be increased on pro-rate basis.

33. The parking lots are allotted on 'as is where is basis' and no request with regard to dispute regarding area shall be entertained.

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39. The NDMC shall have the right to forfeit the security amount if the contractor commits any breach of any of the conditions of this contract. Apart from this, the NDMC shall also have the right to cancel the contract.

40(j). If the contractor commits any breach of any terms and conditions of the license.

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43. The monthly rate of parking tariff for the shop owners in the market areas shall be decided by the NDMC.

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50. Any controversy of disputes arising out of this contract shall be referred to the sole arbitration of the chairperson, NDM C or to any Officer nominated by him in this behalf. There shall be no bar to the reference of dispute to the arbitrator or such an officer as it nominated by the Chairperson even through the said officer is an employee of the NDMC or might have dealt with the matter earlier or expressed his opinion thereon. In case the arbitrator to whom the matter is originally referred is transferred or vacates his office or is unable to act for any reasons, the chairperson, NDMC shall be competent to appoint another person as arbitrator, who shall be entitled to proceed with the reference

from the stage at which it was left by its predecessor. No person other than the one nominated by the Chairperson, NDMC shall act as arbitrator. The decision of the Chairperson or the officer nominated by him shall be final and binding on the party/parties. The limitation for filing claim for arbitration is 90 days from the expiry of the contract period and in case no claim is filed within this period, it shall be presumed that there is no claim.

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55. In the event of surrendering of parking lots by the parking contractor during the contract period, the rights of the acceptance or rejection solely rests with the NDMC and in the event of surrender of the contract, the contractor shall have to give at least 4 months notice by after the lapse of 8 months of the commencing of contract so as to enable the NDMC to make alternative arrangement for operation of parking site for the safeguard of Municipal Revenue. And such notice cannot be accepted in case of arrears pending with the contractor.

56. In case the contractor abandons the contract before the expiry then short tenders shall be invited by the department and the contract shall be awarded to the contractor who quotes the highest license fee in the tender."

14. A perusal of the entire contract/NIT which forms the basis of contract between the parties, shows that the only obligation on NDMC after auction of parking sites was to see that the terms and conditions of the contract were complied with by the contractor. There was no obligation on NDMC to help the contractor in realizing the parking fee, to post its men to ensure that the people park their vehicles within the parking sites and do not park outside the parking sites or to post cranes near each parking site to lift the vehicles. There may be more than thousand parking sites in Delhi and if the cranes are to be hired by MCD, NDMC or DDA to be posted near each parking site, the hire charges of the cranes would itself be much more than the

license fee being given by the parking contractor. When a parking site is allotted to a contractor on license, it is for the contractor to ensure that vehicle owners pay him parking fee as per schedule of fee. If some vehicle owners quarrel with him or do not pay parking fee, NDMC cannot be held responsible for this. Every contractor who bids for these parking sites knows that he has to run and manage parking sites of his own without help of NDMC. NDMC does not have a separate police department. Neither police of Delhi comes under NDMC so that NDMC could command to the police to ensure that people do not fight.

15. The demands made by the contractor in the letters written to NDMC were not in accordance with the contract. The contractor was specifically told that the parking sites are on “as is where is basis”. The contractor was also asked to inspect the parking sites before bid. This only shows that the parking sites may be there without electricity, without water connection, without boundary walls and there may be some garbage lying in the parking site. It was for the contractor to bid or not to bid for such a parking site since the bid was on the basis of “as is where is basis”. At the time of inspection, the contractor could also see surrounding vacant areas which were prone to be used by those persons who do not want to follow the law or who fight for free parking. If the contractor was afraid that the surrounding areas of parking site were hazardous to his business, he/she was free not to bid. But once the contractor has given bid after inspection of the parking site, after looking at the surrounding vacant areas where people could unauthorizedly park their vehicles, the contractor could not raise

issues with NDMC that people were parking on the vacant space surrounding parking site or some people were quarreling with contractor or not giving parking charges or there was garbage inside the parking sites which was not removed or water and electricity connection should be provided or boundary walls should be provided around the parking sites. There are many parking sites with no boundary walls, there are many parking sites where there is no electricity, where there is no water connection. All these things and facilities were to be looked into by the contractor before the bid. Once bidding is done with open eyes the contractor cannot raise these issues and refuse to pay the license fee.

16. The learned Arbitrator observed that “as is where is basis” does not include man-made problems subsequent to auction. I consider man-made problems are to be visualized by the contractor before he/she bids and for man-made problems he/she cannot hold NDMC or its employees responsible, unless and until such provision is there in the contract. The Arbitrator’s observation that since the NDMC had fixed the parking fees, NDMC was obliged to see that this parking fee is recovered by the contractor is misconceived. If NDMC had to ensure recovery of parking fee through its employees there was no reason for NDMC to auction the parking sites. These parking sites are not auctioned so that at the cost of NDMC the contractor should earn profits. If for the management of these parking sites NDMC had to employ its personnel, pay them salaries why should the profit go to contractor. NDMC itself can then run the parking sites. Only because

NDMC is not in a position to spare employees and efficiently manage the parking sites, these parking sites are auctioned and they are operated and managed by private contractors.

17. The Arbitrator's observation that allotment of 50 vehicles parking site to Sarojini Nagar Market caused loss to the contractor is totally misconceived and without any basis and without any evidence. There was no bar on NDMC in allotment of further parking sites to any other association or contractor, once it had done the allotment of a parking site to the respondent. Many parking sites are adjoining one another and they can be allotted to different contractors. If the parking site to Sarojini Nagar Market's shopkeepers had been allotted out of the parking site of the claimant/respondent, the case would have been different. But since a separate parking site was allotted to market association that could not be a cause of awarding damages to the contractor. Moreover, the contractor had failed to lead evidence to show that before allotment of parking sites to market association number of vehicles being parked inside her parking lot was more and after allotment of parking site, the number of vehicles had gone down. In fact it was her complaint that there was quarrel between market association and her employees and this quarrel should be solved. Looking at the representation of market association, a separate 50 cars parking site was given to the market association. Sarojini Nagar Market is such a huge and crowded market that no parking site would be ever free. It only seems that the contractor was a novice in the field and was not able to manage the parking area. Though she had taken

the contract but she wanted to run away from the contract and started writing letters from the very next day to NDMC about those things which were not within the contract. It was not within the contract to provide her electricity and water connection or boundary walls around the parking sites. It was not within the contract to provide her cranes and to ensure that parking fee is paid to her. She even wrote for removal of garbage which she could herself get removed by engaging a truck hardly at cost of Rs.1,000/- or so and get the parking site clean. It was within her obligation to keep the parking site clean. However, for all these things she raised issues with NDMC contrary to contract.

18. I consider that the learned Arbitrator exceeded his jurisdiction by not adhering to terms of the contract and going beyond the terms of contract in awarding compensation to the petitioner on account of her failure to manage and operate the parking sites.

19. The learned Arbitrator also wrongly held that the termination of license by NDMC was not in order. As per terms of contract, the license could be terminated without notice. In this case, NDMC gave an opportunity to the claimant to pay the outstanding license fee to avoid termination of contract. However, the claimant seemed in no mood to continue with the contract and that is why time and again contractor asked NDMC to refund the security. She did not pay the license fee and the contract was liable to be terminated without any notice as per the conditions of contract and security was liable to be forfeited. However, the Arbitrator ignored the terms and conditions of the contract. I consider that the award made by the

learned Arbitrator is not at all tenable and is liable to be set aside being contrary to the terms of the contract.

20. The award passed by learned Arbitrator is hereby set aside.

October 06, 2009
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SHIV NARAYAN DHINGRA J.