

\$~

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

+ W.P.(C) 3337/2010

S.D.ENGINEER & CONTRACTOR Petitioner

Through Mr. Ajay Kumar Porwal, Advocate

versus

MAHANAGAR TELEPHONE NIGAM LTD. Respondent

Through Mr. H.S. Dahiya, Advocate

%

Date of Decision: 5th September, 2013

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J: (Oral)

1. Present writ petition has been filed under Article 226 with the following prayers:-

- “(i) *Quash the letter No. EE/C/MTNL/AWARD/09-10/J.O. No. 05 and subsequent proceedings thereof as being illegal, arbitrary and violative of Article 14 and 16 of the constitution of India and hence and void ab-initio;*
- (ii) *Direct the respondent to settle the account of the petitioner in accordance with law and in the light of the general terms & condition as enshrined in the original contract agreement signed between parties to the present litigation;*

(iii) *Issue such other/Further orders as are deem fit and proper under the facts and circumstances of the case alongwith the costs of litigation.”*

2. The relevant facts of the present case are that in May 2009 respondent invited a tender for a term contract for building maintenance and miscellaneous civil works at MTNL TE Building at Kidwai Bhawan, Technical Blocks, New Delhi.

3. Since the petitioner was the lowest bidder, the contract was awarded to it after they deposited the performance guarantee amounting to Rs. 3,64,900/-.

4. On 1st June, 2009, petitioner was allotted Agreement No. 07/EE/C/EC/MTNL/09-10/07 and the work was to commence forthwith.

5. On 25th November, 2009, respondent issued a letter to petitioner bearing subject “Term Contract of Building for maintenance and miscellaneous civil capital works at MTNL TE Building at Kidwai Bhavan (Technical Block), New Delhi. (SH: Civil works at New RSU at South Block, N.D.)”.

6. As according to petitioner, respondent vide letter dated 25th November, 2009 had directed the petitioner to commence work at South Block, which did not form part of the tender documents, petitioner refused to do so.

7. On 8th March / 22nd March, 2010, respondent rescinded the aforesaid contract. The relevant portion of the respondent’s letter dated 8th March / 22nd March, 2010 is reproduced hereinbelow:-

“Whereas under Clause 16 & 7.3 of the aforesaid agreement the Engineer-in-charge have powers to take action under 16.1 (i & ii) in the event of failure to commence aforesaid Job order work by the Contractor so that in the opinion of the Engineer-in-Charge (which shall be final and binding). You have already failed to commence Job order work by the stipulated date of completion and whereas you were served with show cause notice in this regard under this office letter No. EE(C)/II/MTNL/2009/266 dated 17.02.2010 & EE(C)/II/MTNL/09-10 dated 19.02.2010 which has not been replied to the satisfaction of the Engineer-in-Charge by the date specified in the show cause notice, therefore under powers delegated to me under sub-clause 16.1(b). I, Pradeep Pasricha, Ex. En(Civil) Eastern Court, New Delhi, the Engineer-in-Charge for the aforesaid job order work under the aforesaid agreement, for and on behalf of the MTNL New Delhi, hereby:

(a) Rescined/Determine the Job order as aforesaid upon such determination your security deposit, additional security deposit Performance Guarantee proportionate to the Job Order amount stands absolutely forfeited and is absolutely at the disposal of MTNL New Delhi.....”

8. Learned counsel for petitioner has drawn this Court’s attention to para 19 of the writ petition, which reads as under:-

“19. That the despite the repeated request oral as well as written the respondent did not supply the certified copy of the contract agreement to the petitioner for reason best known to them which prima facie shows that working of the respondent is marred with a highly discriminatory and arbitrary functioning which needs corrective measures through the iron hands of judiciary and it is this Hon’ble Court which being the Guardian of the constitutional Rights is empowered to do so.”

9. On the other hand, learned counsel for respondent states that present writ petition is not maintainable as Clause 49.1 of the General Conditions of Contract which forms part of the tender documents contains an arbitration clause. Clause 49.1 of the General Conditions of Contract is reproduced hereinbelow:-

“49.0 ARBITRATION / SETTLEMENT OF DISPUTES

49.1 For Contract other than with Public Sector Undertakings.

Except as otherwise expressly provided in the contract, all or any questions, differences claims and disputes relating to the meaning of specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question claim, right, breach, matter or thing whatsoever in any way arising out of or relating to this contract/tender documents, designs, drawings, specifications, estimates, instructions, order, conditions, meaning and operation or effect of the contract or breach thereof or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of work or after the completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by the Chief Engineer (BW) MTNL, Delhi. It will be no objection to any such appointment that the arbitrator so appointed is a Government / MTNL servant, that he had to deal with the matters to which the contract relates and that in the course of his duties as Government / MTNL servant he has expressed views on all or any of the matters in dispute, or difference. The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, at the time of such transfer or vacation of the office or inability to act. The Chief Engineer (BW) as aforesaid at the time of such transfer, vacation or inability to act, shall appoint another person to act as an arbitrator in accordance with the terms of the contract. Such persons shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than the person appointed by such Chief Engineer (BW), MTNL, Delhi as aforesaid should act as an arbitrator. The arbitrator shall give reason for his award. Subject to as aforesaid the provisions of Arbitration and Reconciliation Act,1996 or any relevant statutory modification or re-enactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceedings under this clause. It is a term of the contract that the party

invoking arbitration shall specify the dispute or disputes to be referred to the arbitration under this clause together with the amount or amounts claimed in respect of each such dispute. If the contractor does not make any demand for arbitration in respect of any claim(s) in writing to CE(BW) MTNL, Delhi, within 90 days of receiving the intimation from the MTNL that the bill is ready for payment, the claim of the contractor(s) will be deemed to have been waived off and absolutely barred and the MTNL shall be discharged and released of liabilities under this contract in respect of this claims.”

(emphasis supplied)

10. Having heard learned counsel for the parties and having perused the documents placed on record, this Court finds that the ‘arbitration clause’ executed between the parties is of extremely wide amplitude as it uses the expression “*in any way arising out of or relating to this contract*”.

11. The Supreme Court in ***Renusagar Power Co. Ltd. Vs. General Electric Company And Another, (1984) 4 SCC 679*** has held as under:-

“25. Four propositions emerge very clearly from the authorities discussed above:

- (1) Whether a given dispute inclusive of the arbitrator's jurisdiction comes within the scope or purview of an arbitration clause or not primarily depends upon the terms of the clause itself; it is a question of what the parties intend to provide and what language they employ.*
- (2) Expressions such as “arising out of” or “in respect of” or “in connection with” or “in relation to” or “in consequence of” or “concerning” or “relating to” the contract are of the widest amplitude and content and include even questions as to the existence, validity and effect (scope) of the arbitration agreement.*
- (3) Ordinarily as a rule an arbitrator cannot clothe himself with power to decide the questions of his own jurisdiction (and it will be for the court to decide those questions) but there is nothing to prevent the parties from investing him with power to decide those questions, as for instance, by a collateral or separate agreement which will be effective and operative.*

(4) If, however, the arbitration clause, so widely worded as to include within its scope questions of its existence, validity and effect (scope), is contained in the underlying commercial contract then decided cases have made a distinction between questions as to the existence and or validity of the agreement on the one hand and its effect (scope) on the other and have held that in the case of former those questions cannot be decided by the arbitrator, as by sheer logic the arbitration clause must fall along with underlying commercial contract which is either non-existent or illegal while in the case of the latter it will ordinarily be for the arbitrator to decide the effect or scope of the arbitration agreement i.e. to decide the issue of arbitrability of the claims preferred before him.

26. At this stage, however, we are concerned with only the first three propositions mentioned above about which no serious dispute was raised by counsel for Renusagar. We are conscious that counsel for Renusagar have strongly disputed the correctness of Proposition 4 above, but we propose to deal with their caveat against it together with the authorities relied upon by them in support thereof later. At this stage it will suffice to observe that since the parties to the underlying commercial contract here have used the expressions “arising out of” or “related to this contract” in the arbitration clause contained in the contract, there can be no doubt that the parties clearly intended to refer the issue pertaining to the effect (scope) of the arbitration agreement to the Court of Arbitration of I.C.C.; in other words, the issue about arbitrability of the three claims under reference has been referred.”

12. Keeping in view the aforesaid mandate of law and the extremely wide amplitude of the arbitration clause in the General Conditions of Contract, this Court is of the view that the effect (scope) of the agreement also comes within the purview of the arbitration clause.

13. Consequently, the issue whether the civil work at South Block, New Delhi forms part of the contract executed between the parties, is an issue that is to be determined by the arbitrator himself. Further, as the present writ petition does not involve any question arising out of public law function, this

Court is of the view that the parties must be relegated to the agreed disputes resolution mechanism.

14. Accordingly, present writ petition is dismissed with liberty to the petitioner to file appropriate arbitration proceeding.

MANMOHAN, J

SEPTEMBER 05, 2013

rn