

IN THE HIGH COURT OF DELHI AT NEW DELHI

ARB.P. 493/2014

SATYA

..... Petitioner

Through: Mr. Rohit Jain, Advocate.

versus

SOUTH DELHI MUNICIPAL CORPORATION..... Respondent

Through: Mr. Sanjeev Sagar, Advocate

CORAM: JUSTICE S. MURALIDHAR

ORDER

04.02.2015

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act ('Act') seeking the appointment of a sole Arbitrator to adjudicate the disputes between the parties.

2. The background of the present petition is that on 21st June 2010 an agreement was entered into between the Municipal Corporation of Delhi ('MCD') the predecessor-in-interest of the Respondent, South Delhi Municipal Corporation of Delhi ('SDMC') with the Petitioner whereby permission was granted to the Petitioner for putting up signage of the size of 25'x 12' with total display area of 300 sq. ft at B-1, Greater Kailash Enclave, Part-2. Clause 5 of the agreement *inter alia* reads as under:

“The second party shall ensure compliance of the relevant provisions of the DMC Act, Advertisement Bye-laws framed thereunder, directions of the courts of law, policy approved by the Hon’ble Supreme Court, and the relevant guidelines of the MCD or the courts of law, as may be provided from time to time. The second party shall be responsible to display MCD’s permission letter No., date and validity of permission at a conspicuous place of each of the advertisements, so displayed.

3. Following the above agreement, on the very next date on 22nd June 2010, a letter was written by the MCD to the Petitioner, stipulating the terms and conditions on which the permission was granted.

4. The Petitioner was issued a show cause notice by the SDMC on 24th September 2013 alleging violation of the terms of the agreement and in particular the Outdoor Advertisement Policy (OAP) of the MCD. The Petitioner replied to the show cause notice on 8th October 2013. By letter dated 7th November 2013, the SDMC informed the Petitioner that its reply had been found unsatisfactory. However, the Petitioner was afforded a personal hearing on 8th November 2013. The Petitioner wrote a letter on 8th November 2013 *inter alia* stating as under:

“We have gone through outdoor advertising policy 2007 approved by Hon’ble Supreme Court of India, we could not find out any where that signage cannot displayed on roof top. We request you to point out on what page and category it is mentioned roof top not permitted. Our signages are totally as per approved policy of 2007.”

5. However, by its letter dated 4th June 2014, the SDMC cancelled the permission granted to the Petitioner for putting up the signage. The operative portion of the said letter dated 4th June 2014 reads as under:

“Consequent upon non-compliance of terms and conditions of NOC (i.e. display of self signage on the roof top and in excess size without prior consent of the department) and Outdoor Advertisement Policy, 2007 approved by the Hon’ble Supreme Court of India and after granting of any opportunities and after following due process of law, the competent authority hereby cancel your both permissions granted at property No.B-1, Greater Kailash Enclave, Part-2, New Delhi. You are also directed to remove the both signage immediately and to deposit the outstanding dues upto May 2014, amounting to Rs.13,75,487/- (Thirteen Lac Seventy Five Thousand Four Hundred Eighty Seven only). (Copy of the calculation sheet enclosed)”

6. The Petitioner was asked to deposit the damage charges as mentioned in that letter. On 19th August 2014, a legal notice by was

sent to the SDMC by the Petitioner, *inter alia*, invoking the arbitration clause in the OAP of 2007 and calling upon the SDMC to appoint a sole Arbitrator within a period of one month thereafter. With the Respondent, SDMC not acceding to the said request, the present petition has been filed.

7. Learned counsel for the Petitioner has referred to the OAP which contains the following arbitration clause:

“Any controversy or dispute arising out of the permission granted to the advertiser, for display of advertisement in the MCD area shall be referred to sole arbitration of the Commissioner, MCD or any other officer nominated by him in this behalf either by himself or on party’s request.

There shall be no bar to the reference of dispute to the arbitrator or such officer as nominated by the Commissioner even if the said officer might have dealt with the matter is originally referred is transferred or vacates his office or is unable to act for any reason, the Commissioner, MCD shall be competent to appoint another person to act as an arbitrator, who shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

No person other than the one nominated by the Commissioner, MCD shall act as arbitrator. The decision of

the Commissioner or the arbitrator nominated by him shall be final and binding on the party(ies). The limitation for filing claims 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/dispute.”

8. It is submitted that in terms of Clause 5 of the agreement, the said OAP of 2007, which incidentally was approved by the Supreme Court, was specifically incorporated in the agreement and therefore, was binding on both the parties. Referring to Section 7(5) of the Act, learned counsel for the Petitioner submitted that reference to the OAP in the agreement dated 21st June 2010 should be construed as incorporation of the arbitration clause in the agreement itself. He further pointed out that with the MCD itself having relied on the OAP of 2007 for the purposes of termination of the licence, it cannot dispute the fact that the arbitration clause in the OAP applies as far as the disputes between the parties is concerned.

9. Learned counsel for the Respondent on the other hand submitted that in the absence of an express clause in the agreement incorporating the arbitration clause in the OAP, it could not be said that the arbitration clause governs the agreement between the parties. He further relied

upon the decision of the Supreme Court in *Jagdish Chander v. Ramesh Chander (2007) 5 SCR 720* and an order dated 18th July 2014 passed by this Court in OMP No. 753 of 2014 (*Taranjeet Sapra v. South Delhi Municipal Corporation*).

10. The above submissions have been considered. Clause 5 of the agreement leaves no doubt that the OAP of the MCD approved by the Supreme Court applies to the agreement. It was made abundantly clear in the agreement that the Petitioner was bound by the OAP. In fact, the show cause notice issued to the Petitioner by the SDMC was to the effect that the Petitioner had not complied with the OAP of 2007. The cancellation letter dated 4th June 2014 also specifically refers to the alleged violation of the OAP of 2007 approved by the Supreme Court of India. It is therefore clear that the Respondent SDMC has brought the action against the Petitioner on the basis of the aforementioned OAP approved by the Supreme Court of India.

11. Under Section 7(5) of the Act, there must be a contract in writing between the parties. That contract should make a reference to a document containing any arbitration clause. Thirdly, the reference must be “such as to make that arbitration clause part of the contract”.

12. Section 7(5) of the Act came for interpretation in the Supreme Court in the decisions in *M.R. Engineers and Contractors Pvt. Ltd. v. Som Datt Builders Ltd.* (2009) 7 SCC 696 and *Owners and Parties Interested in the Vessel M.V. "Baltic Confidence" v. State Trading Corporation of India Ltd.* (2001) 7 SCC 473. In *M.R. Engineers* (supra) the Supreme Court drew a distinction between the contracts which merely made a reference to another contract and those where the clause in a contract containing an arbitration clause was expressly incorporated into the main contract. The Supreme Court gave illustrations of the two categories as under:

“17. We will give a few instances of incorporation and mere reference to explain the position (illustrative and not exhaustive). If a contract refers to a document and provides that the said document shall form part and parcel of the contract, or that all terms and conditions of the said document shall be read or treated as a part of the contract, or that the contract will be governed by the provisions of the said document, or that the terms and conditions of the said document shall be incorporated into the contract, the terms and conditions of the document in entirety will get bodily lifted and incorporated into the contract. When there is such incorporation of the terms and conditions of a document, every term of such document (except to the extent it is inconsistent with any specific provision in the contract) will apply to the contract. If the document so incorporated contains a provision for settlement of disputes by arbitration, the said arbitration clause also will apply to the contract.

18. On the other hand, where there is only a reference to a document in a contract in a particular context, the document will not get incorporated in entirety into the contract. For example, if a contract provides that the specifications of the supplies will be as provided in an earlier contract or another purchase order, then it will be necessary to look to that document only for the limited purpose of ascertainment of specifications of the goods to be supplied. The referred document cannot be looked into for any other purpose, say price or payment of price. Similarly, if a contract between X and Y provides that the terms of payment to Y will be as in the contract between X and Z, then only the terms of payment from the contract between X and Z will be read as part of the contract between X and Y. The other terms, say relating to quantity or delivery cannot be looked into.”

13. A question then arises as to whether in the present case it can be said that the arbitration clause in the OAP 2007 has got incorporated into the agreement dated 21st June 2010 between the parties? It may be noted at this stage that neither the decision in *Jagdish Chander* (supra) nor in *Taranjeet Sapra* (supra) expressly discuss Section 7 (5) of the Act or the aforementioned decisions of the Supreme Court explaining the said provision. In fact the decision in *Jagdish Chander* (supra) was not in the context of Section 7(5) of the Act at all.

14. Clause 5 of the agreement in the present case is to be read in the context of the subsequent correspondence exchanged between the

parties in which there is an express reference to the OAP. There is no manner of doubt that the SDMC's action against the Petitioner was based primarily on the fact that the Petitioner had not complied with the requirements of the OAP approved by the Supreme Court. Having made the OAP the basis of its action against the Petitioner, it is not open to the SDMC to now contend that the OAP does not stand incorporated in the agreement dated 21st June 2010 for the purposes of reference of the disputes arising from an alleged breach of the said OAP to arbitration. In other words, it is not possible for the SDMC to selectively rely upon the OAP of 2007 only for the purposes of action it takes against the Petitioner and to say that the said policy will not apply when the question arises whether the disputes between the parties should be referred to the arbitration. At least, as far as SDMC itself is concerned, it cannot be permitted to selectively apply certain clauses of the OAP and not the other clauses. It is clear that as far as the Respondent is concerned, it treated the OAP as having been incorporated *in toto* into the agreement dated 21st June 2010 thus satisfying the requirement of Section 7(5) of the Act.

15. Consequently, the objections of the Respondent to the present petition are hereby rejected.

16. The Court appoints Mr. Ram Murti Bajpai, retired Additional District Judge, residing at F-225, Katwaria Sarai, Near Qutub Hotel, New Delhi as Sole Arbitrator to adjudicate the disputes between the parties including their claims and counter-claims. The arbitration shall take place under the aegis of the Delhi International Arbitration Centre ('DAC'). The fees of the learned Arbitrator will be in terms of the Delhi International Arbitration Centre Arbitration Proceedings (Arbitrators' Fees) Rules.

17. The petition is disposed of. A copy of this order be communicated to the learned Arbitrator as well as Addl. Co-ordinator, DAC forthwith.

S. MURALIDHAR, J.

FEBRUARY 04, 2015

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