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

+ **ARB. A. (COMM.) 33/2016**

Reserved on: 4th October, 2016

Date of decision: 7th October, 2016

GOVT OF NCT OF DELHI

..... Appellant

Through: Mr. Guru Krishnakumar, Senior
Advocate with Mr. Peeyoosh Kalra, Additional
Standing counsel (Civil), Ms. Sneha Iyar and
Ms. Mahua Kalra, Advocates.

versus

ROSMERTA HSRP VENTURES PRIVATE
LIMITED

..... Respondent

Through: Mr. Paras Kuhad, Senior Advocate with
Mr. Rishi Agarwal, Mr. Vivek Jain, Ms. Devika
Mahan, Mr. Jatin Chaturvedi and Ms. Swati
Vijayvirgiya, Advocates.

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T

07.10.2016

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1. This is an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 ('Act') filed by the Appellant, Government of NCT of Delhi ('GNCTD') against an interim order dated 21st May, 2016 passed by the Arbitral Tribunal ('AT') in an application under Section 17 of the Act filed by the Respondent, Rosmerta HSRP Ventures Private Limited ('RHVPL').

2. The background to the present appeal is that pursuant to the notification dated 28th March, 2001 issued by the GNCTD under Section 41 (6) of the

Motor Vehicles Act 1988 ('MV Act') read with Rule 50 of the Motor Vehicles Rules 1989, the Petitioner entered into a Concession Agreement ('CA') with the Respondent for a term of 15 years on 25th April, 2012 for execution of the High Security Registration Plates ('HSRP') project. According to the Appellant, several complaints were received by it regarding violations and irregularities committed by the Respondent in the execution of the HSRP project. On 10th March, 2014 a show cause notice ('SCN') was issued by the Appellant to the Respondent under Clause 10.1 of the CA asking to show cause why the proceedings for termination of the contract be not initiated against the Respondent.

3. In the meanwhile, the Respondent filed OMP No. 186 of 2014 in this Court under Section 9 of the Act in which the following order was passed on 26th March, 2014:

“Learned ASG informs that the Respondent has passed a show cause ` notice to the Petitioner giving 60 days cure period. He states, on instructions, that the Respondent shall act in terms of the contract.

In view of the said position, nothing survives in this petition and the same is accordingly disposed of as such.”

4. A reply was submitted to the Respondent on 15th May, 2014 *inter alia* stating that no breach of the contract was committed by it and in any event the breach, if any, stood already cured. Admittedly, no further steps ensued. On 19th September, 2014 the Respondent invoked the arbitration clause as stipulated under Clause 13.3 of the CA and sought reference of the dispute to arbitration.

5. On 16th January, 2015 the Respondent filed an application under Section 17 of the Act before the AT *inter alia* praying that an ad interim order restraining the Appellant from suspending the HSRP Project in the GNCTD or terminating the CA during the pendency of the arbitral proceedings. Further, an interim order was sought for a direction to the Appellant to “continue performing its obligations under the CA and permit the Claimant to continue performing its obligations under the agreement.” The other interim reliefs sought were to restrain the Respondent from taking steps from holding a fresh tender/auction or from taking any coercive steps against the Respondent in relation to the CA and deviating in any manner from the terms of the CA. A reply was filed by the Appellant to the above application.

6. On 16th January, 2015 the AT issued procedural directions to the parties and laid down the schedule with regard to the filing of the statement of claim, statement of defence and rejoinder. The statement of claim was to be filed by the Respondent on 16th February, 2015. However, it was filed on 11th March, 2015. The prayers in the claim were as under:

"(a) pass an award declaring that the show cause notice dated 10th March 2014 issued by the Respondent as null and void and illegal;

(b) pass an award declaring that the claimant is not in breach of the Concession Agreement dated 25th April 2012; and

(c) direct the payment of cost to the claimant;

(d) pass such other and further order(s) as this Hon'ble Court may deem fit and proper in the circumstances of the case."

7. On 13th March, 2015, the Appellant filed an application before the AT under Section 16 of the Act in which it was contended that the AT did not have the jurisdiction to entertain the claim. The contention of the Appellant was that in order to clothe the AT with jurisdiction, it was incumbent on the Claimant to show that there were disputes between the parties. The only allegation by the Claimant was that the Appellant had failed to initiate the conciliation process provided under the CA and this did not amount to a “dispute or difference” as contemplated under Clause 13.1.1 of the CA. It was further contended that the mere issuance of an SCN did not give rise to any cause of action. It did not constitute an adverse order which affected the rights of the Respondent.

8. The above application under Section 16 of the Act was dismissed by the AT by an order dated 17th March, 2016 by holding that a “dispute or difference” did certainly arise between the parties and that invocation of the arbitration Clause by the Respondent cannot be said to be premature. It was held that for the purpose of the invocation of the arbitral process the contractual relationship between the parties need not come to an end.

9. Thereafter, the AT took up the hearing of the application under Section 17 of the Act and passed the impugned order on 21st May, 2016. In the impugned order it was held *inter alia* by the AT as under:

“12. On the facts and circumstances of the present matter, having considered the respective contentions advanced by the learned Senior counsels for the two sides and in view of the fact that the main matter itself is being set down for final hearing, we direct that the following interim arrangement to be made and remain in operation during the pendency of these arbitral proceedings:

(i) The Authority shall appoint a date of hearing by giving a previous intimation of not less than a week and afford the Claimant an opportunity of being heard on the SCN and its reply.

(ii) The Authority shall, thereafter, pass an order giving reasons in brief in support of the findings arrived at by it. A copy of the order shall be made available to the Claimant and also, placed on record of the Tribunal.

(iii) Any further step based on the decision arrived by the Authority shall be taken against the Claimant only with the leave of the Tribunal.”

10. An apprehension was then expressed by the Respondent that the Appellant herein already formed an opinion against the Respondent and was firm on terminating the CA and, therefore, a hearing by the authority would be a mere empty formality. The AT was, however, not impressed with the above submission. It observed as under:

“It is one thing to take defense as a litigant but it is another thing to perform a *quasi judicial* function of hearing and deciding. The CA is a statutory contract. The law has placed confidence in the Authority. At least for the present, we do not see any reason to apprehend why the Authority would not be just and fair. We do trust and hope that the Authority, who is a highly placed official of the Government, would while affording the hearing to the Claimant and arriving at the findings, act with objectivity and open mind keeping in view the paramount consideration of public interest.”

11. The AT further clarified that whatever had been stated in that order “does not amount to expression of an opinion on the merits of the case either way which is yet to be heard.”

12. This appeal was first listed on 14th September, 2016 when the Respondent was already represented. The appeal was directed to be listed next on 22nd September, 2016 on which date a detailed hearing took place. The submissions of Mr. Guru Krishnakumar, learned Senior counsel appearing for the Appellant and Mr. Paras Kuhad, learned Senior counsel appearing for the Respondent were heard at length.

13. At the stage it is necessary to refer to the relevant portions of Clause 10.1 of the CA which reads as under:

“10: Termination

10.1.1 Save as otherwise provided in this Agreement, in the event that any of the defaults specified below shall have occurred and the Concessionaire fails to cure the default within the cure period set forth below, or where no cure period is specified, then within a cure period of 60 (sixty) days, the Concessionaire shall be deemed to be in default of this Agreement (a Concessionaire Default) unless the default has occurred solely as a result of any breach of this Agreement by the Authority or due to Force Majeure: The defaults referred to herein shall include:

[Clauses (a) to (v), not reproduced]

10.1.2 Without prejudice to any other rights or remedies which the Authority may have this Agreement, upon occurrence of a Concessionaire Default, the Authority shall be entitled to terminate this agreement by issuing a Termination Notice to the Concessionaire; provided that before issuing the Termination Notice, the Authority shall by a notice from the Concessionaire, of its intention to issue such Termination Notice and grant 15 (fifteen) days to the Concessionaire to make a representation, and may after the expiry of such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination

Notice, subject to the provisions of Clause 10.1.3”.

14. As already analysed by the AT in the impugned order, the above Clause contemplates that before the CA could be terminated for default of the Concessionaire and for the consequences to follow, the Authority of the Appellant has to take the following three steps:

“(i) Issue a Cure Notice to the Concessionaire calling it upon to cure the default within the period as specified in the CA, or within sixty days, if no period is specified;

(ii) If the default is not cured then issue a notice to the Concessionaire indicating its intention to issue termination notice, i.e. a pre-termination notice giving fifteen days time to the Concessionaire to make representation against;

(iii) Issue Termination Notice, which will have the effect of terminating the CA.”

15. By the impugned order what the AT has ensured that the next logical steps following the issuance of the SCN take place. This was as a result of the stand of the Appellant, as noted by the AT in para 11 of the impugned order, that the SCN dated 10th March, 2014 was “in substance a cure notice only”. Further a submission was made by Mr. Guru Krishnakumar, learned Senior counsel for the Appellant, before the AT that “the Competent Authority shall certainly follow the process of termination as provided in the CA, step by step, in the event of its forming an opinion in that direction.” It was in respect of the above submission that the AT issued the above directions in para 12 of the impugned order which has been extracted hereinabove.

16. The Court is of the view that with the AT having accepted the plea of the

Appellant that the SCN was in effect a 'cure notice' under Clause 10.1 of the CA, which was accepted by the Respondent since no appeal against the said order has been filed by it, prayer (a) of the claim viz. a declaration that the SCN was null, void and illegal does not survive. The Court is of the view that what remains to be examined is only the legality of the order that would be passed by the Authority after hearing the Respondent. Again, prayer (b) of the claim viz. whether the claimant is in breach of the CA has to be determined in the first instance by the Authority in terms of Clause 10.1.1.

17. Even where the Authority is not satisfied that the Concessionaire has cured the defects as pointed out in the cure notice, it cannot yet terminate the CA. It has to necessarily give the Concessionaire 15 days' time to make a representation and it is only after considering such representation, and not being persuaded by it, that the Appellant can issue the termination notice. The AT has, in the impugned order, set down the time schedule for the above steps.

18. The Appellant is aggrieved mainly by the direction issued by the AT in the impugned order that "further steps based on the decision arrived at by the Authority would be taken against the Claimant only with the leave of the Tribunal." According to the Appellant, it cannot be fettered in proceeding under Clause 10 in the above manner. If the Respondent is aggrieved by the decision of the Appellant, it could certainly avail of the remedies under law at that stage. The submission is that the AT could not have anticipated the consequences that would flow from the decision of the Authority even before the Authority takes such a decision.

19. Mr. Paras Kuhad, learned Senior counsel for the Respondent, submitted that the Appellant had been delaying the consideration of the SCN for an unreasonably long period. It had not even filed a reply to the statement of claim. He submitted that the Appellant has not challenged the order dated 17th March 2016. While it issued the communication dated 22nd June 2016 for a hearing on the cure notice before the Commissioner of Transport no hearing was actually held after the second date thereafter on account of adjournment sought by the officers of the Appellant. Only on one occasion did the Respondent seek an adjournment. The Appellant was, therefore, not proceeding in a fair and objective manner. The present appeal itself was an abuse of the process of law.

20. According to the Respondent, the Appellant had acquiesced in the order dated 21st May 2016, acted upon it and therefore was precluded from challenging it. Mr. Kuhad further pointed out that the main case itself was fixed for hearing by the AT on 13th October 2016 and six consecutive dates were fixed for hearing and conclusion of the arguments. Further with the Appellant having accepted the order dated 17th March 2016 rejecting its application under Section 16 of the Act, it was bound to comply with the directions issued by the AT and could not seek to frustrate the arbitral proceedings. According to the Respondent, notwithstanding with the impugned order, it was still open to the Respondent to question the very issuance of the SCN in the arbitral proceedings.

21. The Court is unable to agree with the submission of Mr. Kuhad that notwithstanding with the impugned order dated 21st May 2016 of the AT

which takes forward the process pursuant to the issuance of the SCN, the Respondent can still challenge the SCN itself as being null and void. It appears to the Court that by setting in motion the process of hearing pursuant to the issuance of the cure notice i.e. the SCN, the AT has in fact accepted the plea of the Appellant that the SCN was in effect a cure notice in terms of Clause 10.1.1 of the CA. The Respondent has not challenged the impugned order dated 21st May 2016. What remains to be ensured, and this is what the AT seeks to do by the impugned order, is that hearing pursuant to the cure notice takes place in the fair and time bound manner and the Authority should give its decision with reasons again in a time bound manner as contemplated by the impugned order of the AT.

22. The question that next arises is regarding the authority who would pass an order on the Cure Notice and the one that would thereafter consider the Respondent's representation in the event the Authority does not accept its explanation in response to the cure notice. Accordingly, on 22nd September 2016 the Court required the Appellant to clarify on affidavit the name and designation of the Authority that would consider the reply to the cure notice and the one who would consider the representation that may be made by the Respondent in terms of Clause 10.1.2 of the CA. The Court on 22nd September 2016 passed the following order:

“1. Notice. Learned counsel for the Respondent accepts notice.

2. The Court directs the Appellant to file an affidavit, without prejudice to its rights and contentions, specifying:

(i) The name and designation of the Authority who will be

considering the reply of the Respondent to the 'cure notice' dated 10th March 2014, in terms of the impugned order of the Arbitral Tribunal (AT).

(ii) That the said Authority will not be transferred or sent on deputation till he completes the exercise as far as taking a decision on the reply to the notice is concerned.

(iii) The time period within which, subject to both the sides cooperating with him by not taking unnecessary adjournments, the Authority will give his final decision on the said cure notice.

3. It will also be clarified in the affidavit whether in terms of Clause 10.1.2 of the Concession Agreement, in the event the Authority is not satisfied with the reply to the cure notice, it will issue a termination notice only after it objectively considers the representation made by the noticee to whom the termination notice is intended to be issued, and further, the Authority who will consider the said representation.

4. The affidavit be filed within three days with an advance copy to the counsel for the Respondent who is permitted to file reply thereto as well as to this appeal before the next date.

5. List on 4th October, 2016.

6. A copy of this order be given *dasti* under the signature of Court Master."

23. Pursuant to the above order, an affidavit has been filed by Mr. K.K. Dahiya, Special Commissioner (Transport) on 27th September 2016 paras 3, 4 and 5 of which read as under:

"3. I say that the reply of the Respondent to the cure notice dated 10th March 2014 shall be considered by Sh. D.R. Arora, Deputy Commissioner, Transport Department Govt. of NCT of

Delhi. The Deputy Commissioner, shall endeavour to give his final decision on the said cure notice within 90 days of the passing of the order by this Hon'ble Court, subject of course to both the parties cooperating and not taking unnecessary adjournments.

4. It is assured to this Hon'ble Court that the Deputy Commissioner will neither be transferred nor sent on deputation till the time the aforesaid exercise of taking a decision on the reply to the cure notice is completed.

5. In the event the aforesaid authority is not satisfied with the reply to the cure notice and recommends to issue a termination notice in terms of Clause 10.1.2, the Respondent shall be provided with an opportunity to make a representation in terms of the said Clause of the Concessionaire Agreement and representation shall be considered by the Commissioner, Transport Department, Govt. of NCT of Delhi.”

24. A reply has been filed by the Respondent to the above affidavit in which it is pointed out that hearing on the cure notice must be by the Authority under the CA which is the Principal Secretary and Commissioner, Transport Department, GNCTD and not the Deputy Commissioner, Transport Department. Attention has been drawn to the definition of 'Authority' under Clause 15.1 of the CA which “shall mean and include an officer of the Commissioner of Transport as designated by the GNCTD or any other agency of GNCTD so notified by the GNCTD for this purpose.” Since no agency has been notified by the GNCTD, the only Officer who can consider the reply to the cure notice is the Commissioner of Transport or the Principal Secretary of the Department of Transport. A reference is also made to the impugned order dated 21st May 2016 where the AT has noted that the

Authority is the Principal Secretary and the Commissioner of Transport Department. It is further submitted that for the consideration of the representation to be objective and meaningful, it should be by the next higher authority and not by the same authority against whose determination the representation is made. It is stated in the case of the GNCTD, the next higher authority is the Lieutenant Governor of Delhi.

25. The other objection by the Respondent is to the submission made on affidavit by the Appellant that the Authority would need 90 days to pass an order on the cure notice. As far as this submission is concerned, it was clarified by Mr. Peeyoosh Kalra, learned Additional Standing counsel for the Appellant that the Appellant would abide by any direction that the Court may issue to dispose of the cure notice in a shorter time.

26. The matter was heard again on 4th October 2016. Although Mr Kuhad had been heard at sufficient length by the end of that hearing, he insisted on a further oral hearing, which the Court felt was not warranted since all the relevant arguments had been made by then. Nevertheless, both parties were permitted to further supplement their submissions with written notes of arguments. The Appellant has tendered a written note of arguments running into 3 pages and the Respondent has submitted a written note of arguments running into 29 pages. These have been considered by the Court.

27. The Court finds merit in the submissions of Mr Kuhad, learned Senior counsel for the Respondent, that it is the Authority as defined in Clause 15.1 of the CA who should take a decision as far as the cure notice is concerned.

If there is no order already passed by the GNCTD designating the Deputy Commissioner for the purpose of Clause 15.1 of the CA, the hearing on the cure notice has to be conducted only the Commissioner of Transport. In other words if the Deputy Commissioner proposes to continue with the hearing he can do so only if there is already order issued (and not hereafter issued) designating him as the Authority in terms of Clause 15.1 of the CA and not otherwise.

28. The Court further directs that the hearing on the cure notice should be concluded within a period of 15 days from today with the full cooperation of both the Appellant and the Respondent with either side not being permitted to take unnecessary adjournments. The Authority will proceed to pass a reasoned order on the cure notice not later than four weeks from today and communicate such decision to the Respondent not later than one week thereafter. If such decision is adverse to the Respondent, then within 15 days after receiving a copy of the decision the Respondent will make its representation. Within two weeks of the receipt of such representation, an authority higher to the one who took the decision on the cure notice will consider such representation, and if it considers necessary give a hearing to the Respondent. Thereafter an appropriate order will be passed on such representation within a further period of 15 days. The right of the Respondent to challenge the order passed on the cure notice as well as the order passed on the representation in accordance with law is reserved.

29. Likewise the Appellant can also thereafter proceed to pass the consequential order in terms of the Clause 10 of the CA. If the termination

notice is to be issued after rejection of the representation, then such termination notice will not be given effect to by the Appellant for a period of 15 days thereafter to enable the Respondent to seek appropriate reliefs in accordance with law.

30. The direction issued by the AT in the impugned order that further steps shall be taken by the Appellant only with the leave of the AT is hereby set aside. The impugned order of the AT stands modified in the above terms. Needless to state that the AT will postpone the further and final hearing till the above time bound steps are completed. It will be for the AT to thereafter consider, whether in light of its impugned order as modified by this order, any or all of the claims of the Respondent, as presented by it before the AT, survive for determination.

31. The appeal and application are disposed of in the above terms with no order as to costs.

OCTOBER 7, 2016

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S. MURALIDHAR, J