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

+ **ARB. A. (COMM.) 7/2017**

M/S S.GHOSH & ASSOCIATES

..... Appellant

Through: Mr Sandeep Sharma and Mr Aditya
Vashisth, Advocates.

versus

DELHI DEVELOPMENT AUTHORITY

..... Respondent

Through: Mr Sanjeev Sabharwal, Standing
Counsel for DDA alongwith Mr Hem
Kumar, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

28.03.2017

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VIBHU BAKHRU, J

IA No.3908/2017

1. Allowed, subject to all just exceptions.
2. The application stands disposed of.

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3. Issue notice. The learned counsel for the respondent accepts notice.
4. The appellant has filed the present appeal under Section 37(2) of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning the order dated 06.02.2017 (incorrectly dated as 06.01.2017) passed by the arbitrator holding that an arbitration agreement does not exist between the

parties.

5. The appellant is a firm engaged in the business of providing design, architectural and engineering solutions in various infrastructural projects. In the year 1999, the respondent (DDA) invited all registered architects to compete and furnish layout plans and design solutions for their Mega Housing Project under the name and style of “*Development of Housing Complex including houses & other community facilities at Vasant Kunj, New Delhi*”. The appellant participated in the said competition and submitted its design, which was selected by the jury. Accordingly, a letter dated 05.10.1999 was issued by DDA to the appellant appointing the appellant as a consultant for the said project. Thereafter, the parties entered into an agreement dated 10.11.2000 (hereafter ‘the Agreement’). Admittedly, certain disputes have arisen in respect of the said Agreement and, accordingly the same were sought to be referred to arbitration.

6. Clause 16 of the Agreement between the parties - which is asserted to be the arbitration clause by the appellant - reads as under:-

“16). Except where otherwise provided in this agreement, any dispute difference or question arising at any time between the parties in respect of the construction of this agreement or concerning provision herein contained or arising out of this agreement shall be referred to the Engineer Member of the Delhi Development Authority at the time of dispute and if at the relevant time there is no Engineer Member, the Vice Chairman of the Delhi Development Authority. The decision of the Engineer Member or the vice Chairman as the case may be, shall be final and binding and shall not be questioned in any cost or

Forum on any account whatsoever.

The Architect shall continue to perform his duties with all diligence notwithstanding the fact that a dispute has arisen."

7. Pursuant to the aforesaid clause - *albeit*, with variation as to the person to be appointed as the arbitrator - Shri S. R. Pandey, (Retired) ADG, CPWD was appointed as an arbitrator with the consent of the appellant. Before the arbitrator, DDA filed its defence, *inter alia*, contending that there was no agreement between the parties, which came to be accepted by the arbitrator in the impugned order.

8. Mr Sharma, learned counsel for the appellant referred to the decision of the Supreme Court in **Mallikarjun v. Gulbarga University: (2004) 1 SCC 372** and on the strength of the said decision contended that clause 16 of the Agreement must be construed as an arbitration clause since all the necessary ingredients of an arbitration agreement were present in the said clause. He submitted that although the said clause does not specifically refer to the arbitration, it does record an agreement between the parties to refer all disputes, differences or questions arising between the parties in respect of the construction of the agreement or concerning the provisions thereof to the Engineer Member, DDA.

9. He has also drawn the attention of this Court to a letter dated 08.10.2014 sent by DDA and the appellant's response dated 09.10.2014. Mr Sabharwal, learned standing counsel for the DDA does not dispute the clause or the letters referred by the appellant.

10. Clause 16 of the agreement does not mention the word "arbitration"

and does not expressly provide that the provisions of the Act would be applicable but undoubtedly, it does record an unequivocal agreement between the parties to refer their disputes to the Engineer Member of the DDA and in absence of the Engineer Member, to the Vice Chairman of the DDA. The said clause also expressly records that the decision of the Engineer Member or of the Vice Chairman of the DDA, would be final and binding and would not be questioned in any Court or forum on any account, whatsoever.

11. In **Bihar State Mineral Development Corporation and Anr. v. Encon Builders (I) (P) Ltd.**: 2003(7) SCC 418, the Supreme Court spelt out the essential features of an arbitration agreement. The relevant extract of the said decision is set out below:

"13. The essential elements of an arbitration agreement are as follows:

- (1) There must be a present or a future difference in connection with some contemplated affair.
- (2) There must be the intention of the parties to settle such difference by a private tribunal.
- (3) The parties must agree in writing to be bound by the decision of such tribunal.
- (4) The parties must be ad idem."

12. In ***Mallikarjun v. Gulbarga University*** (*supra*), the Supreme Court had the occasion to consider a clause similar to clause 16 of the Agreement; the clause recorded the agreement of the parties to accept the decision of the Superintending Engineer of Gulbarga Circle to be final, conclusive and

binding. The Court, after referring to the decision in *Bihar State Mineral Development Corporation and Anr.* (*supra*) held as under:

"9. Applying the aforesaid principle to the present case, Clause 30 requires that the Superintending Engineer, Gulbarga Circle, Gulbarga, to give his decision on any dispute that may arise out of the contract. Further we also find that the agreement postulates present or future differences in connection with some contemplated affairs inasmuch as also there was an agreement between the parties to settle such difference by a private tribunal, namely, the Superintending Engineer, Gulbarga Circle, Gulbarga. It was also agreed between the parties that they would be bound by the decision of the tribunal. The parties were also *ad idem*."

13. In the light of the aforesaid decisions, clause 16 of the Agreement would qualify as an arbitration agreement, as all the necessary elements of an arbitration agreement are extant in the said clause.

14. Any doubt that any party or this Court must have with regard to whether said clause constitutes an arbitration clause is put to rest in view of the correspondence between the parties. By a letter dated 08.10.2014 the Director (Works), DDA sought consent of the appellant for referring the disputes to the sole arbitrator. The said letter reads as under:-

"M/s Sumit Ghosh & Associates
R-4, Hauz Khas,
New Delhi-16

**Sub: DDA Mega Housing Projects behind D-6 at Vasant
Kunj, New Delhi
Ref.: Your letter dt. 23.7.2014**

This is in response to your letter dt. 23.7.2014 requesting to resolve and conclude the ongoing dispute of unpaid bills of 2011. In this regard, I have been directed to intimate that in order to resolve the issue relation to unpaid bills etc. Engineer Member has decided to appoint Sh. S. R. Pandey, retired, ADG, CPWED as Arbitrator. This is a deviation from the provisions contained in the Agreement (Clause -16 of the agreement)

Kindly give your consent to appoint Sh. S. R. Pandey, retired ADG/CPWD as Arbitrator to resolve the issues relating to the payment of your unpaid bills etc.

This may please be treated as MOST URGENT.

(Vijay Kumar)
Director (Works)”

15. A plain reading of the said letter indicates that DDA also understood clause 16 as an arbitration clause and, therefore, sought an express consent of the appellant for appointing an arbitrator other than the Engineer Member or the Vice Chairman, as contemplated under clause 16 of the Agreement.

16. Even if the provisions of clause 16 are disregarded, it would be apparent that the letter dated 08.10.2014 read in conjunction with the appellant's letter dated 9.10.2014 accepting the same, constitutes an arbitration agreement in writing. It is not contested that prior to 08.10.2014, the appellant had already articulated the disputes that had arisen and, therefore, the letter dated 08.10.2014 must be read as DDA's decision to appoint Mr S.R. Pandey as the sole arbitrator and refer the disputes to him. This having been accepted by the appellant, the only conclusion that can be drawn is that the parties had agreed for resolution of disputes by arbitration.

17. In this regard, it is also relevant to refer to Section 7(4) of the Act which expressly provides that arbitration agreement would be in writing if it is contained in an exchange of letters, telex, telegrams or other means of telecommunications, which provide a record of the agreement. DDA having sought the consent of the appellant to refer the disputes to arbitration and the appellant having accepted would, in the view of this Court, be sufficient to infer that the same constituted a record of the arbitration agreement between the parties.

18. In view of the above, the impugned order is set aside.

19. The appeal is allowed. No order as to costs.

MARCH 28, 2017
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VIBHU BAKHRU, J

