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

+ **ARB.P. 793/2016**

SMS LIMITED

..... Petitioner

Though: Mr. Darpan Wadhwa, Mr. Sandeep Das,
Ms. Mehak Khurana & Mr. Kanu Agrawal,
Advocates.

versus

SOUTH DELHI MUNICIPAL CORPORATION

..... Respondent

Though: Mr. Rakesh Mittal & Mr. Kamlesh Anand,
Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER

09.03.2017

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1. This is a petition by SMS Limited under Section 11(6)(a) read with Section 11(12)(b) of the Arbitration & Conciliation Act, 1996 ('Act') seeking reference of the disputes between the Petitioner and the Respondent, South Delhi Municipal Corporation ('SDMC') to arbitration.

2. Originally, a Concession Agreement ('CA') was entered into on 20th April, 2012 between the Municipal Corporation of Delhi ('MCD') and the Petitioner in terms of which a multi-storeyed, state-of-the-art parking facility was to be constructed at Defence Colony, New Delhi on a commercial Design, Build, Finance, Operate and Transfer basis. Some time thereafter in April 2012, the MCD was trifurcated into three Corporations i.e., the North Delhi Municipal Corporation, East Delhi Municipal Corporation and the SDMC. As a result

thereof, the rights and obligations of MCD under the CA stood transferred to SDMC. It is stated that on 4th December, 2012, SDMC executed a Lease Deed of the Project site where by all the land and rights comprising the Project site were leased to the Petitioner. According to the Petitioner a huge expenditure was incurred by it in the preparation of architectural drawings for the layout of the said project which was submitted to SDMC. The Petitioner alleges that SDMC stalled the approval of layout and drawings for a long time resulting in loss of time, profit and opportunity cost.

3. The Petitioner states that when the construction activity was in full swing, the Defence Colony Welfare Association filed a writ petition being WP(C) No. 1076/2013 in this Court praying for quashing of the CA and restraining the Petitioner from constructing the parking complex. By an order dated 20th February, 2013, *status quo* was ordered by the Court. According to the Petitioner, the SDMC failed to get the requisite clearances and also failed to mitigate the Material Adverse Effects that were caused on account of the writ petition. It is stated that the SDMC took no steps to defend the writ petition leaving the Petitioner with no option but to terminate the Agreement in terms of Section 13.1 of the Agreement.

4. The Petitioner served the Respondent with a letter dated 15th January 2014 terminating the CA and demanding refund of the amounts deposited, expenses incurred and Bank Guarantee ('BG'). At a meeting held with the Commissioner, SDMC on 18th February, 2014, it was mutually agreed that the concession fee deposited by the Petitioner would be refunded and the CA would be closed subject to necessary approval of the Competent Authority. Subsequently, by the letter dated 28th February, 2014, SDMC informed the

Petitioner that the Competent Authority has agreed to close the CA and refund the concession fee of Rs. 19 crores and the BG of Rs. 11.24 crores. Soon after the above letter was received, the project site was handed back to the SDMC. The refund of the concession fee and the BG was duly executed by the SDMC in favour of the Petitioner.

5. The Petitioner states that the letter dated 28th February, 2014 wrongly recorded that the Petitioner would not claim any interest on the amount deposited. It is denied that any such consent or waiver was given by the Petitioner. On 13th January, 2015, the Petitioner served a further notice on SDMC claiming the following amounts:

- i. Loss of profit in the sum of Rs. 275 crores.
- ii. Interest on concession fee in the sum of Rs. 7.40 crores.
- iii. Refund of miscellaneous expenses invested under various heads in the sum of Rs. 2.80 crores.

6. With SDMC not responding to the above letter, the Petitioner on 7th December, 2015 called upon the SDMC to refer the issues to 'Mediation'. It was added in the said letter that although there was no arbitration clause in the CA, the Petitioner was ready and willing to submit its claim to arbitration by a sole arbitrator.

7. The Petitioner states that its earlier understanding that there was only a mediation clause and not an arbitration clause was based on incorrect legal advice. Later the Petitioner realised that Article 20 of the CA provides for resolution of disputes between the parties "through the process of arbitration". On 11th February, 2016 a notice was issued by the Petitioner to the SDMC under Section 478(1) of the Delhi Municipal Corporation Act, 1957 ('DMC

Act') claiming Rs. 10,57,86,635 *inter alia* for damages, interest and expenses incurred. This too met with no response. Thereafter, on 29th August, 2016, the Petitioner invoked Article 20 of the CA and requested SDMC to appoint an independent Arbitrator acceptable to both parties.

8. On 23rd September, 2016, SDMC replied to the above notice terming the Petitioner's request for reference of disputes to arbitration as untenable. It was contended that the meeting already held on 18th February, 2014 by the Commissioner was in terms of the said Article 20 and, therefore, no further issue regarding the interest/damages survived.

9. In its rejoinder dated 24th October, 2016 to the said reply, the Petitioner again sought reference of the disputes to arbitration. Thereafter it filed the present petition.

10. Mr. Darpan Wadhwa, learned counsel for the Petitioner and Mr. Rakesh Mittal, learned counsel appearing for the SDMC.

11. Mr. Wadhwa submitted that Article 20 and Sections 20.1, 20.2 and 20.3 thereunder when read collectively indicated unmistakably that the parties agreed to have the disputes resolved through arbitration. He submitted, on the strength of the decision of the Supreme Court in ***Rukmanibai Gupta v. Collector, Jabalpur (1980) 4 SCC 556*** and ***Punjab State v. Dina Nath (2007) 5 SCC 28*** that although Article 20 and Sections 20.1, 20.2 and 20.3 did not use the word 'arbitration', the intention of the parties to have the disputes resolved through the process of arbitration was apparent. He submitted that for the purposes of Section 11(6) of the Act as amended with effect from 23rd October, 2015, this Court had to only satisfy itself as to the existence of the arbitration

clause in the agreement in writing. It was not expected to examine the merits or even the tenability of any of the claims of the Petitioner at this stage.

12. Mr. Wadhwa relied on a decision dated 17th June, 2016 in Arb. P. No. 475/2015 (*SMS AAMW Tollways Private Limited v. South Delhi Municipal Corporation*), where while interpreting an almost similar clause in the CA, this Court in that case had concluded that it was, in fact, an arbitration clause and had referred the disputes to arbitration. He also relied on the decisions in *Bhagwan Devi v. Chairman, Delhi Agricultural Marketing Board 2006 (90) DRJ 86*; *B.R. Ganesh v. The Commissioner, The Bruhat Bangalore Mahanagara Palike ILR 2015 Karnataka 2130* and *Keshab Charan Mohanty v. State of Odisha 2016 (4) Arb LR 237 (Ori)*.

13. Mr. Rakesh Mittal, learned counsel appearing for the SDMC, on the other hand, maintained that the process under Sections 20.1 and 20.2 was at best a process for mediation as is evident from the title to Article 20.2. That process, in fact, got exhausted on 18th February, 2014 between the Petitioner and the Commissioner, SDMC. He took the Court through the correspondence exchanged between the parties and urged that with the return of the concession fee and BG amount to the Petitioner, there was no surviving claim or dispute between the parties requiring adjudication.

14. Mr. Mittal placed reliance on the decisions in *S.B.P. & Co. v. Patel Engineering Ltd. AIR 2006 SC 450* and *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co.(P) Ltd. (2010) 8 SCC 24* to contend that there can be no reference of disputes to arbitration unless there is an agreement between the parties. In other words, a written agreement which expressly stated that the parties agree to have their disputes referred to arbitration was a *sine*

qua non. He sought to distinguish the judgment in **SMS AAMW Tollways Private Limited v. South Delhi Municipal Corporation** (*supra*) and other decisions cited by Mr. Wadhwa. In particular, he submitted that the clauses differently worded were involved in the cases of **Rukmanibai Gupta v. Collector, Jabalpur** (*supra*) and **Punjab State v. Dina Nath** (*supra*).

15. Mr Mittal pointed out that even according to the Petitioner, there was no doubt that there was no arbitration clause in the CA between the parties. He further pointed out that the Petitioner itself had served a notice upon SDMC under Section 478(1) of the DMC Act, which was the notice preceding the filing of a suit. Accordingly, he submitted that the Petitioner had other efficacious remedies available to it in accordance with law including the filing of a civil suit for recovery of damages.

16. The above submissions have been considered. Before discussing the clause in question, the legal position as explained in several decisions of the Supreme Court and the High Courts requires to be examined. In **State of U.P. v. Tipper Chand** (1980) 2 SCC 341, the question was whether the clause in the contract which envisaged the Superintendent Engineer ('SE') having to give a final decision on the disputes could be construed to be an arbitration clause. There the SE was vested only with supervision and administrative control over the work. It was, therefore, held that the SE was not an arbitrator.

17.1 In **Rukmanibai Gupta v. Collector, Jabalpur** (*supra*), the relevant clause in the agreement was Clause 15, which read as under:

"15. Whenever any doubt, difference or dispute shall hereafter arise touching the construction of these presents or anything herein contained or any matter or things connected with the said lands or the working or non-working thereof or the amount or payment of any rent or royalty

reserved or made payable hereunder the matter in difference shall be decided by the Lesser whose decision shall be final.”

17.2 According to the Supreme Court, the language of the above clause clearly indicated that it was an arbitration agreement. It observed as under:

“6. Does Clause 15 spell out an arbitration agreement - Section 2(a) of the Arbitration Act, 1940 defines 'arbitration agreement' to mean a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. Clause 15 provides that any doubt, difference or dispute, arising after the execution of the lease deed touching the construction of the terms of the lease deed or anything therein contained or any matter or things connected with the said lands or the working or non-working thereof or the amount or payment of any rent or royalty reserved or made payable there under, the matter in difference shall be decided by the Lesser whose decision shall be final. The reference has to be made to the Lesser and the Lesser is the Governor. His decision is declared final by the terms of the contract. His decision has to be in respect of a dispute or difference that may arise either touching the construction of the terms of the lease deed or disputes or differences arising out of the working or non-working of the lease or any dispute about the payment of rent or royalty payable under the lease deed. Therefore, Clause 15 read as a whole provides for referring future disputes to the arbitration of the Governor. Arbitration agreement is not required to be in any particular form. What is required to be ascertained is whether the parties have agreed that if disputes arise between them in respect of the subject-matter of contract such dispute shall be referred to arbitration, then such an arrangement would spell out an arbitration agreement. A passage from *Russel on Arbitration*, 19th Ed. p. 59 may be referred to with advantage:

'If it appears from the terms of the agreement by which a matter is submitted to a person's decision that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry and hear the respective cases of the parties and decide upon evidence laid before him then the case is one of an arbitration.' ”

18. In *K.K. Modi v. K.N. Modi (1998) 3 SCC 573*, the Supreme Court

explained what the attributes of an arbitration agreement were, as under:

- “(1) the arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement,
- (2) that the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration,
- (3) the agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal,
- (4) that the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides,
- (5) that the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,
- (6) the agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.”

19. In *Bihar State Mineral Development Corporation v. Encon Builders (I) (P) Ltd. 2003 (7) SCC 418*, the four essential elements for an arbitration agreement were identified as under:

- “(i) There must be a present or a future difference in connection with some contemplated affair;
- (ii) There must be the intention of the parties to settle such difference by a private tribunal;
- (iii) The parties must agree in writing to be bound by the decision of such tribunal; and
- (iv) The parties must be ad idem.”

20.1 In *Mallikarjun v. Gulbarga University 2003 (3) Arb. LR 579 (SC)* the

clause in question read as under:

“Clause 30: The decision of the Superintendent Engineer of the Gulbarga Circle for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or material used on the work, or as to any other question, claim, right, matter, or thing whatsoever, in any way arising out of, or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or those conditions, or otherwise concerning the works or the execution, or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment thereof in case of dispute arising between the contractor and Gulbarga University.”

20.2. The above clause was held to satisfy the four-fold test as identified in ***Bihar State Mineral Development Corporation v. Encon Builders (I) (P) Ltd.*** (*supra*).

21.1 In ***Punjab State v. Dina Nath*** (*supra*), the clause in the work order read as under:

“Any dispute arising between the department and the contractor/society shall be referred to the Superintending Engineer, Anandpur Sahib, Hydel Circle No.1 Chandigarh for orders and his decision will be final and acceptable/binding on both the parties”

21.2 The Supreme Court on analysing the case law till then held in para 10 as under:

“10. We have already noted Clause 4 of the Work Order as discussed hereinabove. It is true that in the aforesaid Clause 4 of the Work Order the words "arbitration" and "arbitrator" are not indicated; but in our view, omission to mention the words "arbitration" and "arbitrator" as noted herein earlier cannot be a ground to hold that the said clause was not an arbitration agreement within the meaning of Section 2[a] of the Act. The essential requirements as pointed out herein earlier are that the parties have intended to make a reference to an arbitration and treat the decision of the arbitrator as final. As the conditions to constitute an

'arbitration agreement' have been satisfied, we hold that clause 4 of the Work Order must be construed to be an arbitration agreement and dispute raised by the parties must be referred to the arbitrator.”

22.1 The above legal position has been reiterated in the decisions of this Court in ***Bhagwan Devi v. Chairman, Delhi Agricultural Marketing Board*** (*supra*) and ***SMS AAMW Tollways Private Limited v. South Delhi Municipal Corporation*** (*supra*). In the latter decision, Clauses 16.1, 16.2 and 16.3 of the agreement dated 14th May, 2011 read as under:

“16.1 Except where otherwise provided in the agreement, all questions and disputes in any way arising of or relating to the agreement shall be dealt with as mentioned below:

16.2 In the event the Contractor considers any work demanded of it as being outside the requirements of the Agreement, or disputes any record or decision given in writing by the Competent Officer in any matter in connection with or arising out of agreement to be unacceptable, it shall promptly within [15] days request the Competent Officer in writing to give his instructions or decision with respect to the same. Thereupon, the Competent Officer shall give his written instructions or decision within period of [30] days from the receipt of the Contractor's letter.

16.3 If the Competent Officer fails to give his instructions or decision in writing within the aforesaid period or if the Contractor IS dissatisfied with instructions or decision of the Competent officer the Contractor may, within [15] days of receipt of the Competent Officer's instructions or decision, appeal to the Commissioner who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of its appeal. The Commissioner shall give his decision in writing within [30] days of receipt of Contractor's appeal which shall be acceptable to the Contractor.”

22.2 This Court in ***SMS AAMW Tollways Private Limited v. South Delhi Municipal Corporation*** (*supra*) accepted the plea of the Petitioner in that case that the above clause was, in fact, an arbitration clause. It was held that the

attributes of an arbitration agreement were present. It was immaterial that the word 'arbitration' was not mentioned. Since SDMC had not taken steps, the Court exercised its power under Section 11(6) of the Act and appointed the arbitrator.

23. The decisions cited by Mr. Mittal only reiterate the well-settled position that in the absence of an agreement between the parties, there can be no reference of disputes to arbitration. However, that is not the point of dispute as far as the present case is concerned. The question really is whether Article 20 read with Sections 20.1, 20.2 and 20.3 can be construed to be an arbitration agreement. The said clauses read as under:

"Article 20: Disputes

In the event that any dispute, controversy or claim arises among the Parties in connection with or under this Agreement or the interpretation of any of its provisions or upon the occurrence of an event of Default any party shall refer the dispute, controversy or claim to the Commissioner, MCD.

Section 20.1 Mediation by Commissioner

The Party that initially issue the notice of intention to refer the matter to the MCD and MCD in Consultation with Consultant will appoint an officer from within or outside MCD who will look into the written documents; (i) a description of dispute; (ii) a statement of that party's position; and (iii) "copies of relevant documentary evidence in support of such position.'

Section 20.2 Performance during Dispute Resolution

Pending the submission of a dispute, controversy or claim to the officer appointed by the MCD and thereafter until the final decision of the officer appointed by the MCD, as the case may be, the parties shall continue to perform all of their obligations under this Agreement, without prejudice to a final adjustment in accordance with such decision.

Section 20.3 Survival

The provisions relating to indemnification contained in Section 15.2, intellectual property contained in Section 18, confidentiality contained in Section 19.1 and the dispute resolution provisions contained in this Article 20 shall survive the termination of this Agreement.”

24. The above clauses envisage “any party” to the CA referring a “dispute, controversy or claim” to the Commissioner, MCD upon the occurrence of an event of default. Therefore, this is not limited only to the Petitioner seeking reference of the disputes to the Commissioner. Under Section 20.1, the procedure that has to be followed by the Commissioner has been set out. Interestingly, although Section 20.1 is titled ‘Mediation by Commissioner’, the text of the said clause does not use the word ‘mediation’ at all. In fact, mediation is a known concept where the mediator facilitates parties arriving at a settlement that is acceptable to them. The mediator himself does not render a ‘final decision’. Section 20.1, on the other hand, envisages a procedure whereby the Commissioner should, in consultation with a Consultant, appoint an officer “from within or outside MCD.” Such officer will look into the written documents; (a) the description of dispute; (b) a statement of the party’s position; (c) copies of relevant documentary evidence in support of such position. Therefore, the exercise to be undertaken by the officer under Section 20.1 is really not an exercise of mediation but of adjudication.

25. It was submitted by Mr. Mittal that there was nothing in Section 20.1 which indicates that the officer should give a hearing. In the considered view of the Court, that requirement of hearing is implicit in Section 20.1. In other words, it is inconceivable that the officer so appointed will proceed to render a final decision in the dispute without hearing the parties.

26. Turning next to Section 20.2, which is titled “Performance during Dispute Resolution.” It provides that till such time the officer appointed by the MCD gives a ‘final decision’, the parties will continue to perform their obligations under the CA “without prejudice to a final adjustment in accordance with such decision.” The expression ‘final decision’ puts it beyond the pale of controversy that the officer appointed by the MCD who will examine the claim, the documentary evidence, etc. will give a ‘final decision’. This is, therefore, clearly an adjudicatory function. It is not an exercise in ‘mediation’.

27. Section 20.3 titled “Survival” states that “the dispute resolution provisions contained in this Article 20 shall survive the termination of this Agreement.” This, therefore, spells out the intention of the parties to treat the entire Article 20 as containing ‘dispute resolution provisions’.

28. The above Article 20 with its three sections appear to contain the elements spelt out in the decision in *Bihar State Mineral Development Corporation v. Encon Builders (I) (P) Ltd.* (*supra*). They envisage a present or future dispute in connection with the CA; they reflect the intention of the parties to have the disputes resolved by a final decision of an officer appointed by the MCD, who may be from within or outside MCD; it is an agreement between the parties that there will be a ‘final decision’. Since it is contained in the CA, the requirement that the parties must be ad idem is also satisfied. The Court is also satisfied that the above clause contains the attributes delineated in *K.K. Modi v. K.N. Modi* (*supra*).

29. The only element of difference when compared with the clauses in some of the cases referred to hereinbefore is that the above Sections 20.1 to 20.3 do not

make the 'final decision' binding on the parties. That, however, will not make a difference to them expressing the intention of the parties to get their disputes resolved through a process which is no different from an arbitration process.

30. For the purposes of Section 11(6)(a) of the Act, all that the Court has to examine is the existence of an arbitration clause and nothing more. Whether the claim of the Petitioner is time-barred or not and/or tenable in law or otherwise not tenable would be considered by the Arbitrator if an objection to that effect is raised by the SDMC. The Court, at this stage, is not expected to pronounce on any of the contentions touching on the maintainability or the merits of the claim or counter-claim as the case may be. All such contentions are left open to be urged in the arbitration proceedings.

31. The mere fact that the Petitioner may have itself at one stage stated that there was no arbitration clause in the CA or that it sent a notice under Section 478(1) of the DMC Act to SDMC or that it sought the reference of disputes to mediation will not come in the way of the Petitioner seeking reference of the disputes to Arbitration in terms of Article 20 read with Sections 20.1 to 20.3 of the CA, which it did by sending a notice dated 29th August, 2016.

32. The SDMC declined to act on the said request. The stand taken by the SDMC that the meeting held with the Commissioner on 18th February, 2014 was pursuant to Article 20 read with Sections 20.1 to 20.3 of the CA is misconceived. The meeting with the Commissioner is not what is envisaged in Article 20. The Commissioner had to appoint another officer either within or outside the MCD for that purpose. It must be remembered that the clause envisages the seeking or the making of reference of disputes to arbitration not only by the Petitioner but even by the SDMC itself. In that event, the

Commissioner could hardly be the appropriate person to himself act as the Arbitrator. He would necessarily have to appoint an officer outside the MCD in consistence with the requirement of the Act as amended from 23rd October, 2015.

33. Consequently, the court overrules the objections of the SDMC and concludes that Article 20 read with Sections 20.1 to 20.3 constitute an arbitration clause agreed between the parties.

34. The Court, accordingly, proposes Mr. Justice A. I. S. Cheema, a former Judge of the Bombay High Court (Mobile Nos.9969108079; 9869553949; 9811787578), as the Sole Arbitrator to adjudicate the disputes between the parties including the claims and counter-claims. In the first instance, the proposed Arbitrator will make a disclosure in terms of Section 11 (8) read with Section 12 (1) of the Act and, thereafter, enter upon reference. In the event the disclosure is not made within a reasonable time or such disclosure discloses the inability of the proposed Arbitrator to act as such, it will be open to the parties to apply to this Court for directions. The parties will appear before Justice Cheema on a date to be fixed by him, which will be informed to the parties at least 15 days in advance. Justice Cheema would fix his own terms.

35. The petition is disposed of in the above terms but in the circumstances no orders as to costs. A copy of this order be delivered to the proposed Arbitrator forthwith.

S. MURALIDHAR, J.

MARCH 09, 2017/*b'nesh*