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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P.(COMM.) 514/2018**

Date of Decision : 18th December, 2018

SMS PARKING SOLUTIONS PRIVATE LIMITED

..... Petitioner

Through Mr.DarpanWadhwa, Sr.
Adv.with Mr.Sandeep Das,
Ms.Cauveri Birbal, Mr.Sail
Singhal and Ms.Surbhi Sharma,
Advs.

versus

NORTH DELHI MUNICIPAL CORPORATION

..... Respondent

Through Nemo

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

I.A. No.17427/2018 (Exemption)

Allowed, subject to all just exceptions.

OMP (COMM) 514/2018

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 11.08.2018 passed by the Sole Arbitrator adjudicating the disputes that

have arisen between the parties in relation to the Concession Agreement dated 23.07.2007 executed between the parties.

2. By way of the above referred Concession Agreement the respondent, the Municipal Corporation of Delhi awarded the project for development, design, financing, construction, operation/maintenance and transfer of (a) state-of-the art parking facilities for systematic and organized parking of vehicles at Kamla Nagar, New Delhi, (b) demanding/ levying, collecting, appropriating and retaining parking fees, tariffs, commercial development lease, license fees and user charges as applicable from the users of the facilities, to the petitioner.

3. The petitioner constructed eight floors of basement parking with three floors on the top, that is, ground, first and second floor as commercial space. The petitioner filed Tax Return for the year 2014-2017 and paid Property Tax only in respect of the ground, first and second floor. The respondent in turn issued a notice dated 18.07.2016 demanding Property Tax even with respect to the floors that were being used as parking area. Dispute arose between the parties as to whether the petitioner is liable to pay the Property Tax with respect to the area being used as parking facility.

4. The petitioner claims that in terms of the Concession Agreement it has to pay the Property Tax only with respect to the area being used for commercial purpose, that is, the ground, first and second floor and not for the area being used as the parking facility.

5. The petitioner places reliance on the definition of “commercial premises” and “commercial area” as defined under Article 1 (Definitions and Interpretations), Section 1.1 (Definitions) of the Concession Agreement. The same are reproduced hereinbelow:

“Section 1.1 Definitions

xxx

“Commercial Premises” means the shops, buildings, establishments, offices, and retail outlets that shall be developed, financed, designed and constructed at the Commercial Area.

xxx

“Commercial Area” means the land and all rights in relation thereto at which the Commercial Premises shall be developed, constructed and established.”

6. The petitioner further places reliance on Article 2.1 (b)(iv) of the Concession Agreement (Grant of authorization/ concession), which is reproduced hereinbelow:

“Section 2.1 Grant of authorization/ concession

xxx

(b) In consideration for implementing the Project, MCD hereby grants to the Authorisee/ Concessionaire as certified by the “Observer” the right and authority/ to undertake the commercial development of the Commercial Area and to levy, demand, collect, retain and appropriate the Commercial Premises Prices.

For this purpose as certified by the observer, MCD shall grant to the Authorisee/ Concessionaire the exclusive right and authority to:

xxx

(iv) Receive Commercial Premises Prices from Lessees as consideration for the lease period on yearly basis at rates determined by the Authorisee/ Concessionaire; provided that the Lessees shall be required to pay to MCD/Competent Authorities land and buildings taxes, property tax and other applicable under Law at the rates prevent from time to time.”

7. Reliance is also placed on Section 4.4 (a) of the Concession Agreement, which is reproduced hereinbelow:

“Section 4.4 50 years (fifty Years) Lease of Commercial Area

(a) In consideration for implementing the Project, MCD shall grant commercial, developmental rights to the Authorisee/ Concessionaire over the Commercial Area. In this behalf, MCD shall, deliver to the Authorisee/ Concessionaire as per terms of the tender document, Vacant Possession of the Project Site, free and clear of all Encumbrances. The Authorisee/ Concessionaire shall remove at its cost the structures or utilities that may exist on or at the Commercial Area MCD shall provide the necessary assistance in this behalf. Thereafter, the Authorisee/ Concessionaire shall have exclusive right and authority to undertake the commercial development or the Commercial Area by constructing the Commercial

Premises there at by itself or through sub-contracting arrangements and to levy, demand, collect, retain and appropriate the Commercial Premises Prices in accordance with the terms hereof.”

8. Learned senior counsel for the petitioner further places reliance on the answer to the query raised by the petitioner on the Request for Proposal. The Request for Proposal *inter-alia* contains the following condition:

“However the Bidders may please note that MCD will charge the prevalent property taxes on all commercial developments proposed.”

9. The petitioner raised the query on the RfP and elicited the following reply:

xxx	xxx	xxx
20.	<u>Regarding the Property Tax:</u> (Tender Document pg.25 last para) We humbly invite your kind attention in this matter as under: (a) The property being constructed and developed belongs to MCD. The bidder is not an absolute owner of the property; on the contrary the bidder is investing the capital for	The Property tax will be charged on the prevalent property taxes that are on the

	<i>the project and the cost of the project is to be recovered through painful slow process during the subsistence of the Concession Period.</i> <i>Hence, it is requested that the owner pay the MCD itself the Property tax or any of such taxes, which in normal course is the liability of the owner of the property.</i>	<i>Commercial Development proposed by the Bidders.</i>
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10. Learned senior counsel for the petitioner, relying upon the above definitions and clauses of the Concession Agreement as also the answer to the query, submits that the property tax was to be paid only for the commercial premises being developed as part of the project. He submits that in terms of the Concession Agreement, there was a clear distinction drawn between the parking area and the commercial premises. Section 2.1(b)(iv), which provides for payment of property tax, was applicable only to the ‘commercial premises’ and not the parking space. He submits that the Sole Arbitrator has therefore, erred in holding that the property tax is payable on the entire project and not confined only to the ‘commercial premises’. He submits that the

Arbitrator has erred in holding that even the parking area would be used for commercial development.

11. I have considered the submissions made by the learned senior counsel for the petitioner, however, find no merit in the same.

12. Section 2.1 of Article 2 of the Concession Agreement gives the scope of authorisation /concession. Clause (a) of Section 2.1 of the Concession Agreement vests the right to develop, finance, design, construct, implement, operate and maintain ‘project’ and enjoy its commercial benefits in accordance with the terms and conditions of the Agreement to the petitioner. Sub clause (b) of Section 2.1 of the Concession Agreement further grants to the petitioner the right and authority to undertake commercial development of the commercial area and to levy, demand, collect, retain and appropriate commercial premises prices, including passing of the burden of property tax with respect to such premises to the lessees thereof. Section 2.1(b)(iv), therefore, cannot be read as a concession or a waiver by the respondent not to levy property tax on the other areas of the project. The Arbitrator has also discussed this issue at great length and interpreted the various terms of the Concession Agreement. I may only quote a part of such discussion in the Arbitral Award as under:-

“21. There is no provision in the bid documents and the agreement and in any document forming part of the main agreement mentioning that the property tax would not be payable in respect of the parking area. The learned counsel for the claimant has made effort to show from various terms of the agreement that the commercial development envisaged was only in respect of commercial area and it did not include parking

area and thus no property tax is payable by the claimant in respect of parking area and it was under this understanding the claimant filed property tax returns and paid property tax only in respect of the commercial area and the same was accepted by the respondent in initially for two years without any objection.

22. The short question arising for decision is as to whether the expression "Commercial development of the project" includes only commercial area and does not include the parking area. The bidding document at page 6 visualized the development of multilevel automatic parking facility and to make the same economically viable, revenue generating uses are proposed in tandem. It was made clear that MCD requires planning, designing construction and managing of multilevel parking structure with commercial complex and envisaged provision of multilevel fully automatic underground car parking as well as commercial and corporate space to cross subsidize the project.

23. The project proposal at page 16 required inter-alia including of parking structure, commercial areas and kiosks, a plan for commercial development and proposed end usage. In its letter dated 28-02-2007 (C-6) the claimant itself referred to sources of revenues from parking fees and lease of commercial property. Obviously charging of parking fees is commercial in nature. The claimant exchanged correspondence with the MCD before agreement was executed in which the claimant reduced the concessionary period to 50 yrs and there was not a whisper about property tax not payable in respect of the parking area.

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26. Mere fact that the parking charges are to fixed with the consent of the respondent does not mean that the parking area cannot be considered part of the commercial project in question. Mere fact the claimant finds the parking fees are not sufficient to even meet the expenses incurred by the claimant for running the parking facilities would not change the terms of the contract. Again the fact that the claimant finds the contract to be economically less viable also does not absolve the claimant to pay the property tax in respect of the parking area as well. The learned counsel for the claimant has argued on the basis of clause 2.1.(b) of the agreement that the commercial development of the project only contemplated development of the commercial area as in this clause no reference is made to parking area and facilities.

The clause reads as “In consideration for the implementing the project, MCD hereby grants to the Authorisee/Concessionaire as certified by the “Observer” the right and authority to undertake the commercial development of the commercial area and to levy, demand, collect , retain and appropriate the commercial premises prices. For this purpose as certified by the observer, MCD shall grant to the Authorisee/ Concessionaire the exclusive right and authority-----”

xxx

28. Then reference is made to sub clause (iv) by which the claimant can receive commercial premises prices from the lessees as consideration for the leases on yearly basis on the rates determined by it provided the lessees shall be required to pay to MCD the property taxes etc. It is argued that there

is no such clause in respect of parking area thus it be implied that the parking area was not to be levied any property tax. There is no merit in this argument. This clause has no applicability to the parking area. This clause was shifting the liability to pay property tax to the licensees whereas the same was not envisaged in relation to the users of facilities.”

13. The Arbitrator having interpreted the terms of the Agreement, which in no way can be said to be unreasonable or perverse, the Award cannot be interfered with in exercise of powers under Section 34 of the Act.

14. In *Associate Builders vs. DDA*, (2015) 3 SCC 49, the Supreme Court has cautioned the Court exercising power under Section 34 of the Act in the following words:

“42. In the 1996 Act, this principle is substituted by the “patent illegality” principle which, in turn, contains three subheads:

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42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

*“28. Rules applicable to substance of dispute. (1)-(2)
(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”*

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to

decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

43. *In McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] , this Court held as under: (SCC pp. 225-26, paras 112-13)*

“112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission [(2003) 8 SCC 593 : 2003 Supp (4) SCR 561] and D.D. Sharma v. Union of India [(2004) 5 SCC 325] .]

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.”

15. In ***National Highway Authority of India v. ITD Cementation India Ltd.*** (2015) 14 SCC 21, the Supreme Court reiterated the above principle in the following words:-

“25. It is thus well settled that construction of the terms of a contract is primarily for an arbitrator to decide. He is entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the contract. The Court while considering challenge to an arbitral award does not sit in appeal over the findings and decisions unless the arbitrator construes the contract in such a way that no fair-minded or reasonable person could do.”

16. In view of the above, I find no merit in the present petition and the same is dismissed with no order as to costs.

NAVIN CHAWLA, J

DECEMBER 18, 2018/Arya



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