

\$~30

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

+ **O.M.P.(I) (COMM.) 553/2017 and IA No. 15547/2017**

AMR INDIA LTD.

..... Petitioner

Through: Mr Arvind Kumar Gupta and
Mr Prashant Bhardwaj,
Advocates.

versus

SOUTH DELHI MUNICIPAL CORPORATION
& ANR.

..... Respondents

Through: Ms Biji Rajesh and Ms Eshita
Baruah, Advocates for Mr
Gaurang Kanth, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

%

02.04.2018

VIBHU BAKHRU, J

1. The petitioner (hereafter 'AMR') has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying for an order restraining respondent no.2 (Bank of Maharashtra) from releasing any amount pursuant to invocation of the Bank Guarantee (Bank Guarantee bearing no. BOM/0387/BG/1056/10-11) dated 22.11.2011 furnished by AMR to respondent no.1 (hereafter 'SDMC').

2. On 23.03.2010, SDMC issued a notice inviting bids for the

work of “improvement of road of 60 feet ROW and above by providing RMC pavement (Phase-I) in various zones in MCD and for work at RMC on Tigri Road from M.B. Road to Durga Vihar, Devli Road from M.B. Road to Devli Village, SSN Marg in village and EPDP road between Kalkaji in Central and South Zone”. The estimated cost of the said works was estimated at ₹34,82,00,000/- and the same was to be completed within a period of 12 months. AMR (then known as AMR Constructions Ltd.) submitted its bid pursuant to the aforesaid invitation. By a letter dated 10.12.2010, AMR was awarded the contract at a value of ₹29,96,23,189/-. Thereafter, on 29.12.2010, AMR and SDMC entered into a formal agreement (hereafter ‘the Agreement’). On 22.11.2011, SDMC released the mobilization advance to AMR against the Bank Guarantee in the sum of ₹150 crores.

3. There are several disputes between the parties and AMR alleges that there were gross delays in execution of the works for reasons that are solely attributable to SDMC. AMR further alleges that although SDMC had released the mobilization advance, the same was also unreasonably delayed. AMR submits that a policy decision was taken by the Government of NCT of Delhi, whereby the works of improvement of roads were handed over to Public Works Department.

4. On 18.12.2014, SDMC sent a letter to the respondent no.2 seeking to encash the Bank Guarantee. Immediately, thereafter, on 19.12.2014, AMR approached SDMC and requested that all disputes be settled. On the same date, SDMC sent a letter calling upon AMR to

extend the Bank Guarantee for a further period of six months. It is stated that, thereafter, SDMC cleared running bills to the extent of ₹7.73 crores and also released three bank guarantees (other than the Bank Guarantee in question). SDMC sent a letter dated 30.10.2017 calling upon AMR to deposit a sum of ₹1,06,61,517/- (One Crore Six Lakh Sixty One Thousand and Five Hundred Seventeen) on account of unrecovered mobilization advance. This was also followed by another letter dated 17.11.2017, wherein SDMC stated that in the event the said amount was not deposited, the same would be recovered along with further interest from the Bank Guarantee.

5. It is in the aforesaid circumstances that AMR has preferred the present petition seeking interim measure of protection.

6. Ms Biji Rajesh, learned counsel appearing for SDMC has opposed the present petition, principally, on two grounds. First, she submits that the Agreement does not contain any arbitration clause and, therefore, there is no arbitration agreement between the parties. Second, she contends that AMR had defaulted in completing the works in terms of the Agreement and SDMC has been unable to recover the mobilization advance. She states that although other bank guarantees may have been released, SDMC is entitled to encash the bank guarantee to the extent of unrecovered mobilization advance along with interest.

7. Mr Arvind Kumar Gupta, learned counsel appearing for AMR has countered the submissions made on behalf of SDMC. He earnestly

contended that since Clause 44 of the General Conditions of the Contract (GCC) expressly provided that the decisions of the Dispute Resolution Committee would be binding, the same clearly embodied the agreement between the parties to resolve the disputes by arbitration. He referred to the decisions of Coordinate Bench of this Court in *SMS AAMW Tollways Private Ltd. v. South Delhi Municipal Corporation & Ors. : ARB. P. 475/2015, decided on 17.06.2016* and *SMS Limited v. South Delhi Municipal Corporation : ARB. P. 793/2016, decided on 09.03.2017* in support of his contention that even though the dispute resolution clause did not contain the word ‘arbitration’, the same was required to be construed as an arbitration clause. He also referred to the decision of the Supreme Court in *Punjab State and Ors v. Dina Nath : (2007) 5 SCC 28* in support of his aforesaid contention.

Reasons and Conclusions

8. The first and foremost question to be decided is whether Clause 44 of the GCC constitutes an arbitration agreement within the scope of Section 7 of the Act. Clause 44 of the GCC is set out below:-

“44. SETTLEMENT OF DISPUTES

For settlement of disputes (if any), a Dispute Resolution Committee (DRC) consisting of one representative each of the contractor and the same shall be presided by Chief Engineer, MCD. The decision of the DRC shall be binding on the both parties i.e. the contractor and the department.

9. It is clear from the aforesaid Clause that the parties had agreed that Dispute Resolution Committee (DRC) would be constituted by one representative of each of the contractor and that the same shall be presided by the Chief Engineer, MCD. The parties had unequivocally agreed that the decision of the DRC would be binding on both the parties.

10. In *K.K. Modi v. K.N. Modi : (1998) 3 SCC 573*, the Supreme Court had set out the following attributes necessary to constitute an arbitration agreement:-

“(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.”

11. In *Bihar State Mineral Development Corporation v. Encon Builders (I) (P) Ltd. : 2003 (7) SCC 418*, the Supreme Court had reiterated the necessary attributes of an “arbitration agreement” 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.”

12. In the present case, Clause 44 of the GCC clearly indicates the intention of the parties to settle the disputes by reference to the DRC and, as stated above, the parties have also agreed that the decision of the DRC would be binding on them. In this view, it is apparent that Clause 44 of the GCC qualifies all conditions, as explained by the Supreme Court, for being construed as an arbitration agreement.

13. In *Rukmanibai Gupta v. Collector, Jabalpur : 1980 4 SCC 556*, the Supreme Court held the following Clause to be an arbitration agreement:-

- “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 Lessor whose decision shall be final.”

14. The Supreme Court explained that “*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.*”

15. In ***Punjab State v. Dina Nath*** (*supra*), the following clause in a work order fell for consideration of the Court :-

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

16. The Supreme Court, after referring to ***K.K. Modi vs K.N. Modi*** (*supra*) and various earlier other decisions, held as under:-

“19. At the risk of repetition we may also say before parting with this judgment that Clause 4 of the Work Order speaks for a dispute between the parties. It also speaks of a dispute and all such disputes between the parties to the Work Order shall be decided by the Superintending Engineer, Anandpur Sahib Hydel Circle No. 1. Obviously,

such decision can be reached by the Superintending Engineer, Anandpur Sahib Hydel Circle No. 1 only when it is referred to him by either party for decision. The reference is also implied. As the Superintending Engineer will decide the matter on reference, there cannot be any doubt that he has to act judicially and decide the dispute after hearing both the parties and permitting them to state their claim by adducing materials in support. In Clause 4 of the Work Order it is also provided as noted herein earlier that the decision of the Superintending Engineer shall be final and such agreement was binding between the parties and decision shall also bind both the parties. Therefore, the result would be that the decision of the Superintending Engineer would be finally binding on the parties. Accordingly, in our view, as discussed herein above that although the expression “award” or “arbitration” does not appear in Clause 4 of the Work Order even then such expression as it stands in Clause 4 of the Work Order embodies an arbitration clause which can be enforced.

20. For the reasons aforesaid, we are of the view that Clause 4 of the Work Order can safely be interpreted to be an arbitration agreement even though the term “arbitration” is not expressly mentioned in the agreement. In view of our discussions made herein earlier, we therefore conclude that Clause 4 of the Work Order constitutes an arbitration agreement and if any dispute arises, such dispute shall be referred to the Superintending Engineer for decision which shall be binding on the parties.”

17. In view of the above, this Court is of the view that Clause 44 of the GCC, as set out above, has to be construed as an arbitration agreement between the parties.

18. The decision in the case of *Karnataka Power Transmission Corporation Limited and Anr. v. Deepak Cables (India) Ltd. : (2014) 11 SCC 148*, which was relied upon by Ms Biji Rajesh, learned counsel for SDMC, would be of little assistance to SDMC. In that case, the relevant clause provided for reference of disputes to the “Engineer”, who was required to give a written notice of his decision within a period of 30 days. It was further provided that such decision would be final and binding upon the parties “until the completion of the works”. It is apparent from the plain reading of the relevant clause that the same did not provide for a final adjudication of the disputes, since the decision of the Engineer was only binding till the completion of the works. In this context, the Supreme Court held that the language used in the clause did not spell out the intention of the parties to get the disputes adjudicated through arbitrator. In the present case, the parties have agreed that the decision of the DRC would be final and binding, and this clearly indicates the intention of the parties to ensure that their disputes be finally settled by the DRC.

19. In view of the above, the objection that the present petition is not maintainable is unmerited.

20. The next question to be considered is whether the petitioner is entitled for the interim relief as prayed for. In this regard, it is clear that the law as to the interdiction of the invocation of bank guarantees is now well settled. The invocation of the bank guarantee cannot be interdicted except in exceptional circumstances of an established fraud and special equities so as to prevent irretrievable justice (*See Svenska*

Handelsbanken v. M/s. Indian Charge Chrome and Others : (1994) 1 SCC 502).

21. In the present case, there is no dispute that SDMC had advanced a mobilization advance against the Bank Guarantee. According to Ms Biji Rajesh, learned counsel appearing for SDMC, SDMC has been able to recover only a sum of ₹71,14,594/- by adjustments from the payments made against running bills. It is further claimed that SDMC is entitled to interest on the unrecovered amount. Ms Biji Rajesh contended that the said interest, computed with effect from 01.12.2014 to 31.03.2018, works out to be ₹26,22,907/-. It is, at once, clear from the above that the said disputes do not present any exceptional case for interdiction of the Bank Guarantee. This Court is also not called upon to examine the merits of the said disputes. It is apparent that the said disputes are merely contractual disputes, which do not warrant interdicting the invocation of the Bank Guarantee.

22. In view of the above, the present petition is dismissed. The pending application also stands disposed of.

VIBHU BAKHRU, J

APRIL 02, 2018

pkv