

\$~

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

%

Date of Decision: 18th November, 2019

+ ARB.P. 447/2019 & I.A. 14266/2019

M/S WESTERN CONSTRUCTIONS Petitioner

Through: Mr. T.S. Ahuja and Mr. Varun S.
Ahuja, Advocates.

versus

M/S EDEN BUILDCON PVT. LTD. Respondent

Through: Mr. Sandeep Sethi, Senior Advocate
with Mr. Devashish Bharuka and Mr.
Ravi Bharuka, Advocates.

+ O.M.P.(I) (COMM.) 141/2019, CRL.M.A. 36004/2019 & I.A.
14265/2019

M/S WESTERN CONSTRUCTIONS PVT. LTD..... Petitioner

Through: Mr. T.S. Ahuja and Mr. Varun S.
Ahuja, Advocates.

versus

M/S EDEN BUILDCON PVT. LTD. Respondent

Through: Mr. Sandeep Sethi, Senior Advocate
with Mr. Devashish Bharuka and Mr.
Ravi Bharuka, Advocates.

CORAM:

HON'BLE MR. JUSTICE J.R. MIDHA

J U D G M E N T

ARB.P. 447/2019

1. The petitioner is seeking appointment of an Arbitrator under Section 11(6) of the Arbitration and Conciliation Act.

2. Hyderabad Urban Development Authority (subsequently reorganized as Hyderabad Metropolitan Development Authority), hereinafter referred to as 'HMDA', conducted an auction of a plot known as "*The Empire*" measuring 25 acres at village Kokapet, District Ranga Reddy, Telangana on 20th December, 2007 in which the respondent participated and gave highest bid of Rs. 300 crores and was declared successful.
3. After making payment of initial deposit of Rs.75 crores, the respondent found that there was pending litigation with respect to the subject plot. The respondent approached HMDA whereupon HMDA offered alternative lands to respondent in lieu of the auctioned plot.
4. Since the respondent did not have any presence in Hyderabad, the respondent engaged the services of the petitioner for identifying a suitable alternative land out of the lands offered by the HMDA. The parties executed MOU dated 23rd March, 2016 in this regard.
5. On 04th October, 2017, the title dispute with respect to the auctioned plot was decided by the Supreme Court in favour of HMDA and the title of HMDA over the auctioned land was confirmed. Based on the confirmation of title, the respondent, by a consent order dated 06th March, 2019 before the Supreme Court in Civil Appeal 2732/2019, agreed to take the auctioned plot upon payment of the balance auction price.
6. On 19th June, 2019, the HMDA executed the registered sale deed in respect of the auctioned plot in favour of the respondent.
7. Vide notice dated 22nd April, 2019, the petitioner demanded 13% of the auctioned plot from the respondent and invoked the arbitration clause contained in clause 7 of the MOU dated 23rd March, 2016 for reference of disputes to arbitration.

8. **Submissions of the petitioner**

HMDA forfeited the initial deposit of Rs. 75 crores paid by the respondent whereupon the respondent challenged the forfeiture and litigation went up to Supreme Court where HMDA agreed to give the auctioned plot to the respondent as the title of HMDA was confirmed by the Supreme Court in another matter. The petitioner rendered services in terms of the MOU and the settlement, by which the respondent got the auctioned plot, was the result of the petitioner's efforts. The petitioner is entitled to 13% of the auctioned plot. The disputes between the parties with respect to the petitioner's entitlement to 13% of the auctioned plot be referred to the arbitration. There is a valid arbitration agreement between the parties contained in clause 7 of the MOU dated 23rd March, 2016.

9. **Submissions of the respondent**

MOU dated 23rd March, 2016 is limited to coordination and negotiation with HMDA in selection of a plot out of the alternate lands offered by HMDA and not with respect to the auctioned land. Admittedly, no alternative plot was taken by respondent from HMDA. The petitioner is not entitled to 13% of the auctioned plot since originally auctioned plot has been allotted to the Respondent, and not any alternative plot. MOU provided for 13% of the alternative plot to the petitioner and in no other mode. There is no dispute between the parties under MOU dated 23rd March, 2016. In ***Baby Arya v. Delhi Vidyut Board***, 2002 (61) DRJ 113, this Court held that any dispute which is not subject matter of the terms of the agreement, is beyond the purview of the arbitration. In ***Ritika Jhanji v. Raghubir Singh Sehgal***, (2009) 2 Arb LR 488, the Division Bench of this Court held that only disputes which are subject matter of the arbitration clause, can be

referred to the arbitration.

10. **MOU dated 23rd March, 2016**

The relevant portion of the MOU dated 23rd March, 2016 is reproduced hereunder:

“WHEREAS, the First Party is in the business of Real Estate Development and Construction works,

AND WHEREAS, having participated as a successful bidder in an auction dated 20.12.2007 conducted by the Hyderabad Urban development Authority (HUDA) now recognized as Hyderabad Metropolitan Development Authority and thereafter paid an amount of about Rs.75.00 crores towards Initial Deposit for the purchase of 25 acres of land termed as The Empire, situated at Village Kokapet District Ranga Reddy (hereinafter referred as “said Land”) under the assurance by HUDA that, the property had clear title, was free of any litigations and free from all sort of encumbrances, that it was government property and they would be given immediate occupation and possession,

AND WHEREAS, after payment of the initial deposit and before the due date of payment of the total balance amount of about Rs.225.00 crores, it was found that the property was subject to litigation well before the announcement for auction and hence had represented to HUDA of the inconsistencies in their representations and undertakings.

AND WHEREAS, in an effort to secure the property purchased by them the First Party entered into a series of correspondence and civil litigation with HUDA, and having paid Rs.75 Crores, the First Party demanded for repayment of the initial deposit together with interest thereon or allotment of fresh lands of equivalent value,

AND WHEREAS, the HUDA (subsequently reorganized as Hyderabad Metropolitan Development Authority- HMDA) now coming forward to offer alternative land in lieu of the auctioned land, and the first party not having their presence in Hyderabad, being unable to assess the value and viability of the areas offered by the HMDA towards their business ends; and

also not being in a position to pursue the issue with the HMDA on a day to day basis, desired that an organization similar to their own, undertake the responsibility of identifying suitable and profitable lands out of those offered by the authority and ensure that the land that is to be obtained now is free from litigation and free from all sort of encumbrances and can be immediately put to use towards their business ends and ensure its proper acquisition and provide help with the preliminary development works,

AND WHEREAS, the Second Party, being local Builders and Real Estate Developers of good repute and standing in Hyderabad, has approached the First Party and offered to undertake the responsibility of selecting suitable and profitable properties out of those offered by the HMDA and also undertake the preliminary development of the property so acquired on behalf of the first party, and has indicated that it will be able to so, if the First Party agrees to compensate the Second Party with 13% of the allotted land in lieu of the responsibilities assigned to it. It is however agreed that the Second Party will be compensated only when the First Party is handed over unencumbered physical possession of the property by HMDA having clear title, free of any litigations and free from all sort of encumbrances. Consequently both Parties being desirous of having a record of their terms of association have decided to enter into this understanding;

NOW THEREFORE, in consideration of the mutual promises and covenants set forth hereinafter, the parties hereto agree as follows:

1. SCOPE OF ACTIVITY

a. The Second Party hereby agree to Co-ordinate and Negotiate with HMDA in selection of the alternate properties offered by HMDA, as per the instructions and to the satisfaction of the First Party and as agreed to by the First Party towards full and final settlement of the transaction of deal between the First Party and HMDA,

b. Ensure the title verification of the property towards alternative allotment so as to ensure that there are no

litigations or any sort of encumbrances on the respective property as agreed to by the First Party, and

c. Arrange for proper survey, demarcation and obtain actual physical possession of the property and provide initial help to the First Party for preliminary development of the property.

2. SUCCESS FEES AND TERMS OF PAYMENT

Subject to successful completion of the scope of activities to be undertaken and the termination clause of this agreement, the First Party shall,

a. Agree to compensate the Second Party, 13% of the allotted land in lieu of the completion of the activities assigned to it as mentioned in Recital 1 "Scope of Activity",

b. However, it is agreed that the Second Party will be compensated only when the First Party is handed over unencumbered physical possession of the property by HMDA having clear title, free from litigation and free from all sort of encumbrances.

3. LIMITATIONS & SUB JUDICE MATTERS

a. This agreement is based on the percept that the HMDA has agreed to provide alternative lands to the First Party, in lieu of the auctioned properties, the costs and payments of the same will be borne by the First Party and HMDA on mutually agreed terms and conditions.

b. The Second Party is not liable to deal with any financial or legal issues pending between the First Party and HMDA or any other legal issues.

c. The activities of the Second Party are limited to the scope of activities detailed in clause 1 above.

xxx

xxx

xxx

6. TERMINATION

Without prejudice to the rights under law, the agreement shall stand terminated after the period of 12 Months if the Second Party fails to adhere the terms and conditions of the agreement without giving any notice.

7. ARBITRATION

If any dispute arises between the Parties hereto during the subsistence of this Understanding or thereafter, in connection

with the validity, interpretation, implantation or alleged breach of any provision of this Understanding or regarding a question, the Parties hereto shall refer such dispute to a sole Arbitrator to be appointed by the First Party. The Arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 and any statutory modifications/amendment thereto. The place of the arbitration shall be in Delhi. The arbitrator shall also decide on the costs of the arbitration proceedings. The arbitration proceedings shall be conducted in English.

8. JURISDICTION

The Agreement shall be governed and interpreted by and construed in accordance with laws of India and the courts in Delhi shall have exclusive jurisdiction to decide all the matters arising out of this agreement and/or directly/ impliedly concerning this agreement.”

(Emphasis Supplied)

Discussions and Findings

11. There is a valid arbitration agreement between the parties which is contained in clause 7 of the MOU dated 23rd March, 2016. The petitioner is claiming 13% of the auctioned plot from the respondent which is disputed by the respondent on the ground that the MOU does not entitle the petitioner to claim any portion of the auctioned plot. According to the respondent, the petitioner would have been entitled to 13% of the alternative land, if allotted, to the respondent in lieu of the auctioned land.

12. MOU dated 23rd March, 2016 has been examined. The petitioner offered to undertake the responsibility of selecting suitable and profitable plot out of the alternative lands offered by HMDA and to undertake the preliminary development of the property. The respondent accepted the above offer and agreed to transfer 13% of the alternative land to the petitioner upon getting the un-encumbered possession with a clear title.

13. The scope of the MOU dated 23rd March, 2016 is defined in clause 1(a) of the MOU as under:-

- (a) The petitioner to coordinate and negotiate with HMDA in selection of alternative properties offered by HMDA to the satisfaction of the respondent;
- (b) Title verification of the alternative land to ensure that there was no litigation or encumbrance on the alternative land; and
- (c) Arrange proper survey/demarcation and physical possession and help in the preliminary development of the property.

14. The petitioner's claim of 13% of the alternative land as provided in Clause 2 of the MOU dated 23rd March, 2016 would arise upon handing over un-encumbered physical possession of alternative land by HMDA with clear title to the Respondent.

15. Clause 3 of the MOU dated 23rd March, 2016 defines limitation and *sub-judice* matters. Clause 3 provides that the petitioner shall not be liable to deal in any financial issue between the respondent and HMDA or other legal issues.

16. Clause 7 of the MOU dated 23rd March, 2016 provides for reference of the only those disputes which are in connection with the breach of the provisions of the MOU.

17. The petitioner's claim to 13% of the auctioned land is beyond the purview of the MOU dated 23rd March, 2016 as no alternative land has been allotted to the petitioner. The petitioner's claim to 13% of the auctioned land is not the subject matter of the MOU dated 23rd March, 2016.

18. The disputes raised by the petitioner are not covered by the arbitration clause and are therefore not arbitrable. The disputes between the parties

with respect to the petitioner's claim to 13% of the auctioned land cannot therefore, be referred to arbitration.

19. The petition is dismissed. Pending application is disposed of.

O.M.P.(I) (COMM.) 141/2019

20. The petitioner is seeking injunction against the respondent from creating any third party interest in respect of the land known as "*The Empire*" measuring 25 acres situated at village Kokapet, District Ranga Reddy, Telangana.

21. This petition is not maintainable as the disputes between the parties are not covered under the MOU dated 23rd March, 2016 and, therefore, the ARB.P.447/2019 under Section 11(6) of the Arbitration and Conciliation Act has been dismissed.

22. This petition is also dismissed. Pending applications are disposed of.

NOVEMBER 18, 2019
ds

J.R. MIDHA, J.