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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ O.M.P. (T) (COMM.) 32/2021 & I.A.4372/2021, I.A.4373/2021
MINESH CHOPRA Petitioner
Through: Mr.Soayib Qureshi and
Ms.Aditi Pundhir, Adv.

versus

DELHI METRO RAIL CORPORATION Respondent
Through: Mr. Arjun Natrajan, Adv.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T (O R A L)

% **23.03.2021**

1. This petition, under Section 14 and 15 of the Arbitration & Conciliation Act, 1996 ("the 1996 Act") has been filed by the proprietor of M/s Milestone Security and Placement Services, seeking termination of the mandate of the learned arbitrator, presently arbitrating on the dispute between the petitioner and the respondent, and appointment of a substitute arbitrator in his place.

2. The dispute emanates out of an agreement dated 8th July, 2014, whereby the petitioner was awarded the tender for operating the parking site at the Patel Chowk Metro Station. The petitioner was required to pay a monthly license fee of ₹ 5,54,000/-. It is asserted, in the petition, that, prior to expiry of the initial term of the license agreement on 15th July, 2017, the respondent requested the petitioner to continue running the parking sites till a new contractor would be

appointed. The petitioner further asserts that the respondent defaulted in taking possession of the aforesaid parking sites from the petitioner and, rather, *vide* letter dated 19th April, 2018, enhanced the monthly license fees and parking charges, in violation of the license agreement. The petitioner protested against this action of the respondent, and reiterated its request to the respondent to take over the parking site.

3. The license agreement contains the following clause, governing resolution of disputes between the parties:

"38. Conciliation and Arbitration

In the event of dispute, difference of opinion or dispute or claim arising out of/ or relating to this agreement or breach, termination or the invalidity thereof, shall firstly be attempted to be settled by conciliation.

All disputes relating to this agreement or on any issue whether arising during the progress of the services or after the completion or abandonment thereof or any matter directly or indirectly connected with this service agreement shall in the first place be referred to a sole conciliator appointed/nominated by CGM/ Civil on receipt of such requests from either parties.

The conciliator shall make the settlement agreement after the parties reach agreement and shall give an authenticated copy thereof to each of the parties.

The settlement agreement shall be final and binding on the parties. The settlement agreement shall have the same status and effect of an arbitration award.

The views expressed or the suggestions made or the admissions made by either party in the course of conciliation proceedings shall not be introduced as evidence in any arbitration proceedings.

Any dispute that cannot be settled through conciliation procedure shall be referred arbitration in accordance with the procedure given in Para given below.

The parties agree to comply with the awards resulting from arbitration and waive their rights to any form of appeal insofar as such waiver can validly be made.

Arbitration Procedure

If the efforts to resolve all or any of the disputes through conciliation fail, then such disputes shall be referred within 30 days to a sole arbitrator who would be nominated by DMRC Ltd. The venue of such arbitration shall be at Delhi/ New Delhi. The award of the sole arbitrator shall be binding on all parties. The cost of Arbitration shall be borne by respective parties. There will be no objection if conciliator/ or sole arbitrator nominated/ appointed is an employee of DMRC.”

4. The respondent failed to take possession of the parking sites and, instead, appointed, *vide* communication dated 15th July, 2019, one Mr. S. Jethwani as the sole arbitrator to arbitrate on the disputes between the petitioner and the respondent. Consequent to the unfortunate demise of the said learned Arbitrator, the respondent, without consent of the petitioner, appointed one Mr. Mahesh Kumar Gupta as the substitute arbitrator in place of Mr. Jethwani. The petitioner objected to this appointment, stating that it was illegal, being unilateral in nature and in violation of the law laid down by the Supreme Court in *Perkins Eastman Architects DPC v. HSCC (India) Ltd.*¹ and *Bharat Broadband Network Ltd. v. United Telecom Ltd.*²

¹ 2019 SCC OnLine SC 1517

² (2019) 5 SCC 755

5. It is in these circumstances that the petitioner has approached this Court for a declaration that the mandate of Mr. Mahesh Kumar Gupta, to arbitrate on the disputes, stands terminated and for appointment of a substitute independent arbitrator in his place.

6. The prayer clause in the petition reads as under:

“In the aforesaid facts and circumstances, it is humbly and most respectfully prayed by this Hon'ble Court may be pleased to;

a) Declare the mandate of the Arbitral Tribunal stands terminated; and/or

b) Pass an order/ direction thereby appointing an independent and impartial arbitrator to adjudicate the disputes between the parties;

c) Pass any such further order / directions as this Hon'ble Court may deem fit and proper in the interest of justice.”

7. Mr. Arjun Natrajan, learned Counsel for the respondent did not oppose the prayer for declaration that the mandate of Mr. Mahesh Kumar Gupta, be terminated, but submitted, *qua* prayer (b) in the petition, that the respondent DMRC had a panel of arbitrators, from which the petitioner could opt for an arbitrator of its choice.

8. Learned Counsel for the petitioner strenuously opposes this request and exalts on the Court, instead, to appoint the substitute arbitrator.

9. To support his submission, Mr. Natrajan relies on the judgment of the Supreme Court in ***Central Organisation for Railway***

*Electrification v. ECI-SPIC-SMO-MCML (JV)*³ and on the judgment of this Court in *Iworld Business Solutions v. Delhi Metro Rail Corporation*⁴.

10. The reliance, by Mr. Natrajan, on these decisions is, in my view misconceived. The arbitration clauses in *Central Organisation for Railway Electrification*³ and in *Iworld Business Solutions*⁴ read thus:

In Central Organisation for Railway Electrification

“64. (1) Demand for Arbitration:

64. (1)(i) In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railways of any certificate to which the contractor may claim to be entitled to, or if the Railways fails to make a decision within 120 days, then and in any such case, but except in any of the “excepted matters” referred to in Clause 63 of these Conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration.

64. (1)(ii)(a) The demand for arbitration shall specify the matters which are in question, or subject of the dispute or difference as also the amount of claim item-wise. Only such dispute or difference, in respect of which the demand has been made, together with counterclaims or set-off, given by the Railways, shall be referred to arbitration and other matters shall not be included in the reference.

³ (2020) 14 SCC 712

⁴ MANU/DE/2193/2020

64. (1)(ii)(b) The parties may waive off the applicability of Section 12(5) of the Arbitration and Conciliation (Amendment) Act, 2015. If they agree or such waiver in writing after having arisen between them in the formation under Annexure XII of these conditions.”

In Iworld Business Solutions

"9.2. The rules of procedure for arbitration proceedings pursuant to GCC Clause 9.2 shall be as follows:

Arbitration & Resolution of Disputes.-The Arbitration and Conciliation Act, 1996 of India shall be applicable. Purchaser and the supplier shall make every necessary effort to resolve amicably by direct and informal negotiation any disagreement or dispute arising between them under or in connection with contract.

Arbitration.- If the efforts to resolve all or any of the disputes through conciliation fail, then such, disputes or differences, whatsoever arising between the parties, arising out of touching or relating to supply/manufacture, measuring operation or effect of the contract or the breach thereof shall be referred to arbitration, in accordance with the following provisions:

(a) Matters to be arbitrated upon shall be referred to a sole arbitrator where the total value of claims does not exceed Rs 1.5 million.

Beyond the claim limit of Rs 1.5 million, there shall be three arbitrators. For this purpose, the purchaser will make out a panel of engineers with the requisite qualifications and professional experience. This panel will be of serving or retired engineers "government departments or of public sector undertakings;

(b) For the disputes to be decided by a sole arbitrator, a list of three engineers taken in the aforesaid panel will be sent to the supplier by

the purchaser from which the supplier will choose one;

(c) For the disputes to be decided by three arbitrators, the purchaser will make out a list of five engineers from the aforesaid panel. The supplier and purchaser shall choose one arbitrator each, and the two so chosen shall choose the third arbitrator from the said list, who shall act as the presiding arbitrator;

(d) Neither party shall be limited in the proceedings before such arbitrator(s) to the evidence or the arguments put before the conciliator;

(e) The conciliation and arbitration hearings shall be held in Delhi only. The language of the proceedings that of the documents and communications shall be English and the awards shall be made in writing. The arbitrators shall always give item-wise and reasoned awards in all cases where the total claim exceeds Rs one million; and

(f) The award of the sole arbitrator or the award by majority of three arbitrators, as the case may be, shall be binding on all parties."

11. The arbitration agreement between the parties in the aforesaid two decisions, therefore, specifically provided for the respondent submitting a panel of proposed arbitrators, out of which the petitioner could choose one. In the present case, the arbitration clause does not contain any such dispensation. It has been held, by the Supreme Court, in unequivocal terms in *UOI v. Premco-DKSPL (JV)*⁵ that the arbitration agreement is sacrosanct, and that there can be no deviation therefrom. This Court has followed the said decision, *inter alia*, in

⁵ (2016) 14 SCC 651

***Valecha Engineering Ltd. v. Delhi Metro Rail Corporation Ltd.*⁶**

12. In view thereof, the prayer, for appointment of a substitute arbitrator by this Court, in exercise of its jurisdiction under Section 14 of the 1996 Act, deserves to be allowed.

13. The amount in dispute is stated to be in the region of ₹47 lakhs. This Court, therefore, appoint Ms. Vibha Mahajan Seth, Advocate (Mob: 9810702410), as the learned Arbitrator to arbitrate on the disputes between the parties. By consent of parties, the learned Arbitrator is permitted to continue the proceedings from the stage at which they stand today. The fees of the learned arbitrator would be fixed after consultation with both parties. The learned Arbitrator would also furnish the requisite disclosure under Section 12(2) of the 1996 Act within a week of entering on the reference.

14. This petition stands disposed of in the aforesaid terms.

MARCH 23, 2021/kr

C. HARI SHANKAR, J.