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

% *Date of Judgment: 10th September, 2021*

\+ **ARB. A. (COMM.) 37/2021 & I.A. 9395/2021**

M/S SWAJAL WATER PVT. LTD ..... Petitioner
Through: Ms Ila Sheel and Mr Sikhar Sheel, Advocates.

versus

INDIAN RAILWAY CATERING AND TOURISM CORPORATION LIMITED & ANR. ..... Respondents
Through: Mr Harshit Agarwal, Advocate for R1.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

VIBHU BAKHRU, J. ***(ORAL)***

1. The appellant has filed the present appeal under Section 37 (2) (b) of the Arbitration and Conciliation Act, 1996 (hereafter 'the A&C Act') impugning an order dated 24.01.2021 passed by the Arbitral Tribunal. By the impugned order the Arbitral Tribunal has rejected the appellant's application under Section 17 of the A&C Act, *inter alia*, seeking that the termination of the Contract with the respondent be

stayed.

2. The appellant was awarded the contract to install Water Vending Machines (101 in number) in four clusters by a letter dated 23.03.2017. The appellant claimed that it successfully installed the Water Vending Machine (WVMs) in terms of the Letter of Award and also paid licence fee amounting to ₹65,42,319/- for the first year including the security deposit of ₹13,32,762/-. There is some controversy whether the licence fee was payable from a fixed date or from the date of actual commissioning of each WVMs.

3. The respondent alleges that the appellant had failed to pay the licence fee in accordance with the terms of their Contract. The respondent had also suspended the Contract with the appellant. There is a dispute between the parties regarding the licence fee payable by the appellant as well as the action of the respondent in suspending the Contract in question. The appellant has raised claims in respect of the quantum of licence fee and has also raised claims on account of the alleged loss suffered by it as a consequence of the actions of the respondent. The Arbitral Tribunal has been constituted and is considering the said disputes.

4. During the pendency of the disputes before the Arbitral Tribunal, by a letter dated 23.11.2020, the respondent terminated the Contract with the petitioner in respect of all four clusters on account of the alleged failure on the part of the appellant in paying the licence fees.

5. In the aforesaid context the appellant had filed an application under Section 17 of the A&C Act praying that the termination order dated 23.11.2020 be stayed.

6. It is the appellant's case that the Contract, in question, is not in the nature of a determinable contract. The appellant contends that the question of default in payment of licence fees – the sole ground on which the respondent has terminated the Contract – is the subject matter of dispute and the Contract in question could not be terminated on that ground.

7. The Arbitral Tribunal heard the application and dismissed the same by the impugned order. The Arbitral Tribunal had reasoned that since the Contract was a determinable one, an application seeking stay of termination of the said Contract was not maintainable as that would amount to granting specific performance of a determinable Contract which is impermissible.

8. The learned counsel appearing for the appellant drew the attention of this Court to the Clause 8.2 of the General Conditions of Contract (GCC) as applicable to the Contract in question. The said clause reads as under:-

8.2	Termination of Licence on other events of default	The licensor shall also be entitled at any time forthwith to terminate the Licence without notice in any of the following events, that is to say(a) in the event of the Licensee being

		convicted by a court of law under the provisions of criminal procedure code or any other law (b) in the event of the Licensee being an individual or, if a firm, any partner in the Licensee firm being at any time be adjudged insolvent or a receiving order or order for administration of his estate made against him or shall take any proceeding for liquidation or composition under any insolvency Act for the time being in force or make any conveyance or assignment of his interest or enter into any agreement or composition with his creditors for suspended payment, or if the firm be dissolved under the partnership Act or, in the event of Licensee being a company, if the company shall pass any resolution to be wound up either compulsorily or voluntarily (c) Repudiation of agreement by Licensee or otherwise evidence of intention not to be bound by the agreement (d) Failure to adhere to any of the due dates of payment specified in the terms and conditions. Immediately on the determination of this agreement the Licensee shall peacefully vacate the premises and hand over to the licensor/railway administration all articles in the custody or possession of the Licensee

		and shall remove all his stores and effects from the said premises. In default the licensor shall be entitled to enter and take possession of the said premises and to lock up the same or remove the furniture or other articles of the Licensee that may be lying there and to dispose of the same by sale or otherwise without being liable, for any damage, and all expenses incurred in connection therewith, shall be deducted by the licensor from the sale proceeds or from the Security Deposit or pending bills of the Licensee.

9. She also referred to the decision of the Madras High Court in ***Jumbo World Holdings Limited and Another v. Embassy Property Developments Private Limited : 2020 SCC OnLine Mad 61*** whereby the Court had referred to an earlier order setting out the features for considering the contract as determinable. Paragraph 23 of the order is set out below:-

> "23. The other aspect that remains to be considered is whether time is of the essence of the SPA and, therefore, whether the Petitioners were entitled to avoid the SPA as per Section 55 of the Contract Act. In this connection, upon appraisal of evidence, the Arbitral Tribunal concluded that time is not of the essence. In addition, the Arbitral Tribunal also held that the Petitioners were in breach of their obligations under the SPA and, therefore, could not insist on the consummation of the transaction within the stipulated

time limit. I see no reason to interfere with these factual findings as per applicable legal principles. As regards the contention that the SPA is not specifically enforceable because it is in its nature determinable, I set out below my analysis from an earlier order dated 26.11.2019 in O.P. No. 698 and 711 of 2012 on this issue:

> "16. On examining the judgments on Section 21(d) of SRA 1877 and Section 14 (c) of the Specific Relief Act, as applicable to this case, i.e. before Act 18 of 2018, I am of the view that Section 14(c) does not mandate that all contracts that could be terminated are not specifically enforceable. If so, no commercial contract would be specifically enforceable. Instead, Section 14(c) applies to contracts that are by nature determinable and not to all contracts that may be determined. If one were to classify contracts by placing them in categories on the basis of ease of determinability, about five broad categories can be envisaged, which are not necessarily exhaustive. Out of these, undoubtedly, two categories of contract would be considered as determinable by nature and, consequently, not specifically enforceable : (i) contracts that are unilaterally and inherently revocable or capable of being dissolved such as licences and partnerships at will; and (ii) contracts that are terminable unilaterally on "without cause" or "no fault" basis. Contracts that are terminable forthwith for cause or that cease to subsist "for cause" without provision for remedying the breach would constitute a third category. In my view, although the **Indian Oil case** referred to clause 27 thereof, which

provided for termination forthwith "for cause", the decision turned on clause 28 thereof, which provided for "no fault" termination, as discussed earlier. Thus, the third category of contract is not determinable by nature; nonetheless, the relative ease of determinability may be a relevant factor in deciding whether to grant specific performance as regards this category. The fourth category would be of contracts that are terminable for cause subject to a breach notice and an opportunity to cure the breach and the fifth category would be contracts without a termination clause, which could be terminated for breach of a condition but not a warranty as per applicable common law principles. The said fourth and fifth categories of contract would, certainly, not be determinable in nature although they could be terminated under specific circumstances. Needless to say, the rationale for Section 14(c) is that the grant of specific performance of contracts that are by nature determinable would be an empty formality and the effectiveness of the order could be nullified by subsequent termination."

10. She submitted that the Arbitral Tribunal had not considered the said question, but had merely proceeded on the assumption that the Contract in question was a determinable one.

11. Mr Aggarwal, learned counsel appearing for the respondent contends that there are other clauses as well which would indicate that

the Contract is a determinable one. However, he does not dispute that the Arbitral Tribunal has not specifically decided the question whether Contract in question was determinable but had proceeded further by refering to the decision of this Court in ***M/s Bharat Catering Corporation v. Indian Railway Catering & Tourism Corporation Ltd. OMP 281/2009 decided on 26.05.2009***.

12. The impugned order indicates that the Arbitral Tribunal has clarified that it was not examining the merits of the controversy with respect to the termination of the Contract in question.

13. This Court is informed that the Arbitral Tribunal has also taken a view that the dispute regarding the validity of termination of the Contract is not one of the disputes referred to the Arbitral Tribunal and therefore, the Tribunal shall not consider the same. Ms Sheel, learned counsel appearing for the appellant has also shared an email dated 13.04.2021 sent by the Arbitral Tribunal, *inter alia*, stating that as under:-

> "........after carefully considering all aspects of the case, I come to the conclusion that it will not be appropriate for the same tribunal to adjudicate in the matter of termination. It is, therefore, suggested that a new Tribunal may be appointed in the matter."

14. It is not disputed that pursuant to the aforesaid email, the respondent has constituted another Arbitral Tribunal which is currently examining the dispute regarding the termination of the Contract in question. Mr Aggarwal, however, states that the

respondent has raised an objection that the said Arbitral Tribunal can only examine the termination of the Contract regarding cluster no. 137 and separate arbitral tribunals are required to be constituted for examining the termination of Contracts in respect of other clusters.

15. Be that as it may, it is not disputed that the Arbitral Tribunal that has rendered the impugned order is not examining the question as to termination of the Contract in question. Clearly, the petitioner's application of interim measures of protection under Section 17 of the A&C Act was in aid of its contention that the termination of the Contract is illegal. Since the Arbitral Tribunal has in unequivocal terms stated that it would not examine the said issue, it was not apposite for the said Tribunal to examine the appellant's application under Section 17 of the A&C Act for interim orders or protection that was founded on its contention that the termination of the Contract is illegal.

16. In view of the above, this Court considers it apposite to allow the present petition and set aside the impugned order while reserving all rights and contentions of the parties. The appellant is at liberty to approach the Arbitral Tribunal which has been constituted to adjudicate the disputes regarding the termination of the Contract in question, for such interim measures or protection as may be advised. Needless to state that if any such application is made to the said Arbitral Tribunal, it shall consider the same on its own merits uninfluenced by the impugned order or any order passed by this Court.

17. It is clarified that all contentions of the parties are reserved.

18. The appeal is disposed of in the aforesaid terms. The pending application is also disposed of.

VIBHU BAKHRU, J

SEPTEMBER 10, 2021
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