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

Date of decision: 08th AUGUST, 2022

IN THE MATTER OF:

\+ **LPA 516/2021 and C.M. No. 47780/2021**

NEPTUNE INDIA LTD ..... Appellant

Through: Mr. Ashish Dholia, Sr. Advocate with Mr. Rohit Gandhi, Mr. Siddharth Kaushik and Mr. Hargun Singh Kalra, Advocates.

versus

NEW DELHI MUNICIPAL COUNCIL ..... Respondent

Through: Ms. Kanika Agnihotri and Mr. Rohan Anand, Advocates for respondent.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

SUBRAMONIUM PRASAD, J.

1. Aggrieved by the Order dated 23.12.2021, passed by the learned Single Judge of this Court in W.P.(C) 3061/2021 dismissing the Writ Petition filed by the Appellant herein, the Appellant has filed the instant LPA.

2. It is stated that a Request For Proposal (hereinafter referred to as 'the RFP') for selection of a concessionaire for design, development, implementation, operation and maintenance of parking guidance and management solution for on-street, off-street and indoor parking space in

the New Delhi Municipal Council (*hereinafter referred to as 'the NDMC'*) area on Public Private Partnership model was advertised by the NDMC on 10.03.2017. The applicants were to quote the "concession fee" as a percentage of gross revenue earned which was to be paid by the NDMC. The Concessionaire was to pay a sum of Rs.75 lakhs per month from the date of handing over of 5392 car parking slots. The concessionaire fee was to vary in case the car parking slots are increased or decreased. The Appellant's bid was accepted on 10.07.2017. The Appellant had quoted a concession fee of 61% of the gross revenue earned subject to minimum concession fee of Rs.75 lakhs per month for 5392 cars. As per the letter of acceptance of tender dated 10.07.2017, the Appellant was directed to submit the performance guarantee of Rs. 4 Crore within 15 days from the date of issuance of letter of acceptance. On 09.08.2017 an agreement was entered into between the Appellant and the Respondent. The agreement entered into between the parties provided for an Alternate Dispute Resolution mechanism by way of Arbitration. Disputes arose between the parties. As per the NDMC, the Appellant had not paid the license fee and had been irregular in the payment of monthly license fee. On 22.02.2021, NDMC wrote a letter to the Appellant stating that the parking slots were handed over to the Appellant on 01.08.2017 and the agreement was executed on 09.08.2017 and, thereafter, some more parking lots were allotted to the Appellant on 01.07.2019. It is further mentioned in the said letter that an amount of Rs.4,06,24,007/- is due on account of non-payment/less license fee deposited by the Appellant till December 2020. The details of the amount which, according to the NDMC, was due and payable by the Appellant has been given in a tabular form. The same reads as under:

Sno	Particulars	Due amount
1	on the account of less or remaining License fee for the period of 1.7.2019 to 31.1.2020	15,29,052/-
2	Licensee fee for the period of Feb.2020&upto 21st March 2020	1,28,92,591/-
3	License fee for the month of June 2020 and July 2020.	1,53,71,936/-
4	Lesser License fee for the period August 2020 to Dec 2020	1,68,96,578/-
5	An amount deposited by the Concessionaire in the month of November 2020	(-)12,82,682/-
	TOTAL	4,54,07,475/-
6	Excess License fee deposited as claimed by the Concessionaire for the Period of 1.08.2017 to 30.06.2019	47,83,468/-
	Net amount to be deposited from the Concessionaire	4,06,24,007

3. The letter also indicates that this amount is to be paid @ 18% compound interest which is to be calculated quarterly as per Clause 3.8.9 of the RFP. It is stated that on receipt of the said letter, the Appellant filed W.P.(C) 3061/2021 for a direction to restrain NDMC from terminating the agreement for non-furnishing of the performance guarantee afresh. A prayer was also made to restrain the NDMC for demanding or recovery of license fee for the month of July-July, 2020 and thereafter from August 2020 to December 2020. A prayer was also made to adjust the encashed performance guarantee for outstanding (if any) and subsequent payable license fee.

4. Material on record indicates that on 08.03.2021, during the course of hearing of the Writ Petition, a submission was made on behalf of the Appellant that the Appellant would replenish the encashed performance bank guarantee in the sum of Rs.4.054 Crores within three months from the date of that Order. It was also stated that the Appellant shall continue to pay regular license fee. The said undertaking was not complied with.

5. Similarly, on 10.11.2021 the very same submission was made on behalf of the Appellant once again and despite the fact that the amount was not paid, the Appellant was once again given time to replenish the bank guarantee for a sum of Rs.4.054 Crore. The bank guarantee was to be given

on or before 30.11.2021. The said undertaking was also not complied with. Thereafter, the case was heard on several dates but the amount has not been paid. The learned Single Judge, therefore, dismissed the Writ Petition on 23.12.2021. The learned Single Judge also held that an alternate remedy by way of Arbitration was available to the Appellant herein. It is this Order which has been challenged in the instant LPA.

6. On 27.12.2021, this Court, while considering the LPA, found that the contract has not been terminated and the Appellant herein was still servicing the contract. *Vide* the said Order, this Court, without making any observations on the merits of the Appeal ordered for status quo subject to the Appellant replenishing the bank guarantee of Rs.4.054 Crores, as mentioned in paragraph No.24 of the impugned judgment by 28.12.2021 and subject to the Appellant paying a sum of Rs.5.48 Crores as allegedly claimed by the Respondents towards the license fee till October, 2021. The said amounts were paid by the Appellant and the same has been noticed in the Order dated 03.01.2022.

7. Material on record also shows that the Appellant approached this Court by filing ARB.P.41/2022 and *vide* Order dated 08.02.2022, an Arbitrator has been appointed.

8. Mr. Ashish Dholia, learned Senior Counsel appearing for the Appellant, contends that the demand made by the NDMC is completely unconscionable inasmuch as the entire parking lots were not handed-over to the Appellant in the first instance. He also states that the Appellant informed the Respondent that there is a shortage of Equivalent Car Space allotted to the Appellant and, therefore, proportionate reduction be made in the license fee. He also contends that in compliance of the Order dated 27.12.2021, the Appellant has already paid Rs.5.48 Crores to the NDMC

via cheque and the NDMC has encashed the same. He, therefore, submits that since the contract had yet not been terminated, the Appellant should be permitted to continue as a Concessionary.

9. *Per contra*, Ms. Kanika Agnihotri, learned Counsel appearing for the Respondent, contends that since an Arbitrator has already been appointed by this Court, the appeal has become infructuous and the issue sought to be raised in the appeal can be raised before the learned Arbitrator. It is also submitted that at the stage of hearing of the Writ Petition, the Appellant had given an undertaking for payment of bank guarantee of Rs.4.054 Crores within three months, however, that undertaking was not fulfilled. She contends that the Writ Petition was finally disposed of on 23.12.2021, that is, after nine months of the said undertaking and the Appellant, therefore, does not deserve any indulgence. She contends that the Appellant has abused the indulgence given to him on numerous occasions by the learned Single Judge and the learned Single Judge dismissed the Writ Petition only on the ground of availability of alternate dispute resolution mechanism when the Appellant did not fulfil the undertaking given by him.

10. Heard Mr. Ashish Dholia, learned Senior Counsel appearing for the Appellant, Ms. Kanika Agnihotri, learned Counsel appearing for the Respondent, and perused the material on record.

11. Material on record discloses that the Appellant has approached this Court by filing ARB.P.41/2022 and this Court *vide* Order dated 08.02.2020 has appointed an Arbitrator. As rightly pointed out by the learned Counsel for the Respondent that once an Arbitrator is appointed, it is for the Appellant to approach the Arbitrator under the Arbitration and Conciliation Act, 1996 for grant of interim relief. The learned Counsel for the

Respondent is therefore, correct in stating that the Appeal has become infructuous. Needless to say that the Arbitrator will take into account the amount of Rs.4.054 Crore which has been deposited pursuant to the Order dated 27.12.2021 while considering the grant of relief under Section 17 of the Arbitration and Conciliation Act, 1996.

12. This Court does not find any infirmity in the Order passed by the learned Single Judge who has noticed that various opportunities have been given to the Appellant to deposit Rs.4.054 Crore, as has been undertaken by the Appellant on 08.03.2021 and once again on 10.11.2021.

13. It is made clear that this Court is not making any observations as to whether *Force Majeure* clause can be invoked by the Appellant or not and it is left open to the Arbitrator to decide the same.

14. With these observations the Appeal is disposed of leaving all the questions open for the Arbitrator to decide the same in accordance with law.

15. Pending applications, if any, also stands disposed of.

SATISH CHANDRA SHARMA, CJ

SUBRAMONIUM PRASAD, J

AUGUST 08, 2022
Rahul