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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 06th October, 2023**Pronounced on: 16th October, 2023**

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ARB.P. 97/2023**DSCL FENGSHUN WABAG**

..... Petitioner

Through: Mr.Deepak Khurana, Mr.Abhishek Bansal, Mr.Meenal Garg, Advocates.

versus

DELHI JAL BOARD & ANR.

..... Respondent

Through: Ms.Sangeeta Bharti, Standing Counsel with Ms.Malvi Balyan, Ms.Aarushi Behl, Advocates for DJB. Mr.Sanjay Jain, Senior Advocate with Mr.Yuvraj Sharma, Advocate for R2.

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ARB.P. 98/2023**DSCL FENGSHUN WABAG**

..... Petitioner

Through: Mr.Deepak Khurana, Mr.Abhishek Bansal, Mr.Meenal Garg, Advocates.

versus

DELHI JAL BOARD & ANR.

..... Respondent

Through: Ms.Sangeeta Bharti, Standing Counsel with Ms.Malvi Balyan, Ms.Aarushi Behl, Advocates for DJB. Mr.Sanjay Jain, Senior Advocate with Mr.Yuvraj Sharma, Advocate for R2.

CORAM:**HON'BLE MR. JUSTICE YOGESH KHANNA****YOGESH KHANNA, J.**

1. These petitions are filed under Section 11(6) of Arbitration and Conciliation Act for appointment of an arbitrator on behalf of respondents.



The respondent no.1 is the Delhi Jal Board (DJB) and respondent no.2 is Engineers India Limited (EIL). The EIL, project management consultant had invited bids in capacity vide bid document for undertaking the work of “design and construction of interceptor sewers along Najafgarh area, supplementary and Shahdara drains for abatement of pollution in Yamuna river” and thereafter to carry out the “operation and maintenance of the interceptor sewer system” for a period of eleven years, including one year defect liability period.

2. For the purpose of execution/entering into the contract with respondent no.1 and respondent no.2, the petitioner entered into a Consortium Agreement dated 02.02.2011 to submit a bid proposal jointly for the work in package 4 and 5 in the name of “DWFC” and to undertake the execution of the said work. The DSC Limited was appointed as the lead member of the consortium for the performance of the contract/project. Feng-Shun and Wabag each executed a power of attorney in favour of the lead member.

3. The petitioner submitted its bid /proposal on 07.03.2011 which was accepted by EIL on 01.07.2011 and detailed letter of acceptance was issued on 22.07.2011. The petitioner through its lead member accepted these documents.

4. Thus, on 07.02.2012, a tripartite agreement was executed between the consortium through its legal members, EIL and DJB towards the execution of the project. The said contract has an arbitration clause viz. clause 38.3 which read as under:



“38.3 ARBITRATION:

38.3.1 Except as otherwise provided elsewhere in the Contract , if during the execution of the Contract, any dispute, difference, question or disagreement arises between the parties with respect to the interpretation of Contract and/or any other issue(s) and/or breach thereof, the same shall be decided by an Arbitral Tribunal consisting of three Arbitrators. Each party shall appoint on Arbitrator within 30 days from the date of receipt notice to other party and the Arbitrator so appointed shall appoint the third Arbitrator who will act as Presiding Arbitrator.

38.3.2 In case a party fails to appoint an arbitrator within 30 days from the date of receipt of request to do so by the other party, upon request of a party, the Chief Justice of High Court or any person or institution designation by him within whose jurisdiction the subject contract has been made, shall appoint the arbitrator/ Presiding Arbitrator upon request of one of the parties.

38.3.3 If any of the Arbitrators so appointed dies, resigns, incapacitated or withdraws for any reason from the proceedings the concerned party/arbitrators shall appoint another person in his place in the same manner as aforesaid. Such person shall proceed with the reference from the stage where his predecessor had left if both parties consent for the same.

38.3.4 It is mandatory for the party invoking arbitration shall specify all disputes to be referred to arbitration at the time of invocation of arbitration and not thereafter.

38.3.5 The Arbitral Tribunal shall give reasoned award and the same shall be final conclusive and binding on the parties.

38.3.6 The fees of the arbitrators shall be borne by the parties nominating them and the fee of the Presiding Arbitrator, costs and other expenses incidental to arbitration proceedings shall be borne equally by the parties.

38.3.7 Subject to the aforesaid the provisions of the Arbitration and Conciliation Act, 1996 and any statutory modifications or re-enactment in lieu thereof shall apply to the arbitration proceedings under this clause.”

5. The project/work was delayed due to delayed handing over of the site beside other hindrances at site. The hindrances were allegedly attributable to the respondents. It is submitted due to various delays and lapses of the respondents, the work got delayed resulting in prolongation of contract due to which petitioner incurred additional losses.

6. The work of package-5 was completed on 26.10.2020 and a completion certificate on 08.02.2021 was issued. The petitioner submitted



its 44th and final bill to respondent no.2 for a sum of Rs.15,22,73,945/- for package-5. Subsequently, the petitioner in compliance of clause 38 of SCC vide its letter dated 31.12.2021 has submitted an amount of Rs.121.25 crores excluding accrued interest for package-5 which was ignored. Later the petitioner through its letter dated 25.05.2022 submitted their final bill for package-5 for total eight claims for a sum of Rs.159,06,23,586/-and nominated Mr.Justice N.K.Modi (Retd.) to be its nominee arbitrator. Similarly, in package-4 a final claim of Rs.145,62,55,053/- was also sent but was ignored and hence Mr.Justice N.K.Modi (Retd.) was appointed by the petitioner as their nominee arbitrator.

7. The learned senior counsel for the EIL submitted though it does not dispute the arbitration clause but have no financial liability in the contract as it was only acting on behalf of DJB and had referred to clause 38.6 of the agreement, as under:

“38.6 DISPUTE RESOLUTION

38.6.1 *The Contractor fully understands that EIL is executing the subject work on behalf of the Client. Any award passed by the Arbitral Tribunal shall be enforced against EIL only on receipt of the amount so awarded by the Arbitral Tribunal from the Client as per the terms of the main Contract executed between Ell & the Client. Any specific performance of Contract so ordered by the Tribunal shall also be equally applicable and enforced against the Client and its legal successors or permitted assignees.”*

8. The learned counsel for the respondent no.1 on the other hand had raised an objection neither the *complete original agreement* nor its *certified copies* were filed on record and also the agreement is not properly stamped. The learned counsel for the petitioner submits the petitioner had filed the *true copy* of the agreement/contract on record in line of the judgment passed



in *Splendor Landbase Ltd. vs. Aparna Ashram Society and Another* 2023 SCC OnLine Delhi 5148, which read as under:

“9. Under the Stamp Act, and also reiterated in N.N. Global, what is liable to be impounded under Section 33 of the Stamp Act, is the original of the concerned agreement, which alone is to be treated as an instrument under Section 2(14) of the Stamp Act. Reference in this regard is apposite to the observations in para 145 of the N.N. Global as reproduced hereinabove.

10. As such, it is incumbent for a petitioner who files a petition under Section 11 of the Act, on the basis of an unstamped/ insufficiently stamped arbitration agreement, to file the original instrument as executed. However, where the arbitration agreement is duly stamped, filing of the original instrument can be obviated provided the true copy or certified copy thereof clearly indicates that it has been duly and properly stamped and it is also accompanied by a clear and cogent statement to that effect in the petition filed under Section 11 of the Act.

11. In the concurring opinion of C.T. Ravikumar, J, a distinction was drawn between a „certified copy“ and a „true copy“ and it was noticed that in the scheme for appointment of arbitrators framed by Hon’ble the Chief Justice of India in exercise of powers under Section 11(10) of the Act, it has been specifically contemplated as under:-

“2. Submission of request.—The request to the Chief Justice under sub-section (4) or sub-section (5) or sub-section (6) of Section 11 shall be made in writing and shall be accompanied by—

(a) the original arbitration agreement or a duly certified copy thereof;

In contradistinction, in the scheme for appointment of arbitrators framed by Hon’ble the Chief Justice of the High Court of Delhi, in exercise of powers under Section 11(10) of the Act, it has been specifically provided as under:- “2. Submission of request—(i) The request under sub-section (4) or subsection (5) or sub-section (6) of Section 11 of the Ordinance shall be made in writing in the form prescribed in Appendix I and shall be accompanied by:

(a) The original arbitration agreement or a true copy thereof;.....”

12. In N.N. Global, the Supreme Court has observed that if a certified copy of the agreement is filed alongwith the petition under Section 11 of Act, it must necessarily declare the stamp, which has been paid in regard to the original.

13. It would not be inconsistent with the judgment in N.N. Global to obviate the requirement to file the original of the concerned agreement/ instrument when on the face of it, the same is duly stamped and a statement to this effect is made in the petition under Section 11 of the Act, and the same is not controverted by the opposite party. Of course, at any stage, when an issue arises as to sufficiency of stamping, it would be open for the Court to require



the concerned party who has possession of the original agreement to file the same in Court. In this regard, it is notable that the scheme for appointment of arbitrator framed by Hon'ble the Chief Justice of the High Court of Delhi also provides as under:-

"4. Seeking further information—(i) The person designated under para 3 say seek such further information or clarification or documents, from the party making the request under this scheme, as he may deem fit....."

14. The next issue that is required to be considered is the procedure post impounding of the unstamped instrument/ agreement as mandated under Section 33 of the Stamp Act."

9. The said true copy is filed and there is an averment in the petition under Section 11 to this effect as well. Qua the stamp duty reference is made to Schedule IA of Stamp Duty Registration Fees and Court Fee in Delhi Act. Article 5 of the Stamp Duty Act read as under:

<i>Description of Instrument</i>	<i>Proper Stamp-duty</i>
<i>5. Agreement or Memorandum of an agreement-</i> <i>(a) if relating to the sale of a bill of exchange;</i> <i>(b) if relating to the sale of a Government Security or share in an incorporated Company or other body corporate;</i> <i>(c) if not otherwise provided for.</i> <i>Exemption</i> <i>Agreement or memorandum of agreement</i> <i>(a) for or relating to the sale of goods or merchandise exclusively, not being a Note or Memorandum chargeable under No. 43.</i> <i>(b) made in the form of tenders to the Central Government for or relating to any loan.</i>	<i>One Rupee for every Rs.10,000 or part thereof</i> <i>One rupee for every Rs.10,000 or part thereof of the value of the security or share subject to maximum of Rs.1,000.</i> <i>Fifty Rupees.</i>

10. As per Article 5 (supra) stamp duty of Rs.50/- was though payable but Rs.100/- has been paid as stamp duty for the agreement on record. The



learned counsel for the respondent has not shown me any other article under which more stamp duty than Rs.50/- is payable on the subject agreement.

11. In the circumstances, subject to the plea of respondent no.2 *qua* clause 38.6.1 of the agreement, I hereby appoint Mr.Justice Badar Durrez Ahmed (Retd.) (Mob.No.7042205786) as a nominee arbitrator on behalf of the respondents. Both the learned arbitrators may appoint the learned Presiding Arbitrator.

12. The petitions stands disposed of along with pending application(s), if any.

YOGESH KHANNA, J.

OCTOBER 16, 2023

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