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

Date of decision: 29th OCTOBER, 2024

IN THE MATTER OF:

+ **ARB.P. 1359/2024**

MS RAPID CONSTRUCTIONS

.....Petitioner

Through: Mr. Vikas Mehta, Ms. Prity Sharma,
Mr. Sandeep Ratra and Ms. Nitika
Grover, Advocates.

versus

SOUTH DELHI MUNICIPAL CORPORATIONRespondent

Through: Mr. Vishal Raj Sehijpal, Standing
Counsel for MCD with Ms. Priyanka
Handa, Advocates.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT (ORAL)

1. The Petitioner has approached this Court under Section 11 of the Arbitration & Conciliation Act seeking appointment of an Arbitrator to adjudicate upon the disputes between the Petitioner and the Respondent arising out of an agreement dated 20.04.2018 for work order No. EE (PROJECT - II)/WZ/SYS/2018-19/05 dated 11.04.2018.
2. Material on record shows that the Respondent/South Delhi Municipal Corporation floated a tender bearing No. EE (PROJECT- II)/WZ/TC/2017-2018/14 for construction, operation and maintenance of automated multilevel car parking facility at J-Block Market, Rajouri Garden, West Zone and construction, operation and maintenance of automated multilevel car parking facility at Defence Colony Market in Ward 58-S under the



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Central Zone. The operation and maintenance for a period of four years (beyond one year for defect liability period) and the estimated cost of the project for car parking facility at Rajouri Garden was Rs. 2567.93 lakhs and the estimated cost of the project for construction of the car parking facility at Defence Colony Market in Ward 58-S under Central Zone was Rs. 2479.10 lakhs.

3. It is stated by the Petitioner that the necessary bank guarantees and earnest money deposits were made. It is stated that the bid submitted by the Petitioner was accepted and the letter of acceptance was issued to the Petitioner on 04.04.2018. The requisite performance bank guarantee was also given by the Petitioner.

4. It is stated that work order No. EE-Pr.West- II/SYS/2018-19/05 dated 11.04.2018 for construction, operation and maintenance of automated multilevel car parking facility at J-Block Market, Rajouri Garden, West Delhi was issued in favour of the Petitioner.

5. As per the work order, the work for construction, operation and maintenance of automated multilevel car parking facility was to be completed within a period of 12 months for a contractual amount of Rs.26,04,76,349/-. However, it is stated that the project could not take off due to court proceedings and the stay granted by this Court *vide* Order dated 01.06.2018 in W.P.(C)6402/2018. It is stated that the stay granted by this Court was vacated *vide* Order dated 13.08.2018 and the same was challenged by filing an SLP being Special Leave to Appeal (C) No. 23790/2018.

6. Since the construction of the project could not start, the Petitioner *vide* letter dated 26.05.2020 requested the Respondent for closure of the



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contract and payment of compensation for the sum of Rs.5,03,60,314/-. Since the dispute was not being resolved, the Petitioner issued a notice dated 14.04.2021 invoking arbitration Clause 25 of the General Conditions of the Contract read with Clause 22.2 of the Miscellaneous Section of the Contract.

7. On 31.10.2023, a reply was received by the Petitioner stating that the claims of the Petitioner are not maintainable as there is no arbitration clause between the parties. The Petitioner has therefore approached this Court by filing the instant petition under Section 11 of the Arbitration & Conciliation Act seeking appointment of an Arbitrator.

8. Clause 21 of the Request for Proposal document contains the Clauses of Contract. At this juncture, it is necessary to reproduce Clause 25 of the Clauses of Contract. Clause 25 of the said Clause 21 of the Request for Proposal deals with settlement of disputes and arbitration, which reads as under:-

"CLAUSE 25

Settlement of Disputes & Arbitration- deleted

Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with



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as mentioned hereinafter:

(i) If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer in-Charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.

If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with the decision of the Chief Engineer, the contractor may within 30 days from the receipt of the Chief Engineer decision, appeal before the Dispute Redressal Committee (DRC) along with a list of disputes with amounts claimed in respect of each such dispute and giving reference to the rejection of his disputes by the Chief Engineer. The Dispute Redressal Committee (DRC) shall give his decision within a period of 90 days from the receipt of Contractor's appeal. The constitution of Dispute Redressal Committee (DRC) shall be as indicated in Schedule 'F'



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(and MISCELLANEOUS SECTION). If the Dispute Redressal Committee (DRC) fails to give his decision within the aforesaid period or any party is dissatisfied with the decision of Dispute Redressal Committee (DRC), then either party may within a period of 30 days from the receipt of the decision of Dispute Redressal Committee (DRC), give notice to the Engineer in-chief for appointment of arbitrator on prescribed proforma as per Appendix XV, failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

It is a term of contract- that each party invoking arbitration must exhaust the aforesaid mechanism of settlement of claims/disputes prior to invoking arbitration.

(ii) Except where the decision has become final, binding and conclusive in terms of Sub Para (i)-above, disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Engineer in-chief, SDMC, in charge of the work or if there be no Chief Engineer, the Additional Director Commissioner of SDMC. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed hi respect of each such dispute along with the notice for appointment of arbitrator and giving



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reference to the rejection by the Chief Engineer of the appeal.

It is also a term of this contract that no person, other than a person appointed by such Engineer in-chief or Additional commissioner, SDMC, as aforesaid, should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

It is also a term of this contract that if-the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs. 1,00,000/-, the arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator, these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement



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of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid."

9. Clause 22 under the Miscellaneous Section provides for dispute redressal and settlement. It is also important to reproduce Clause 22.2 under the Miscellaneous Section of the Request for Proposal document, which reads as under:-

"22.2 Dispute Resolution:-

Any dispute and/or difference arising out of or relating to this contract will be settled as per Clause 25 failing which the matter will be referred for adjudication to local jurisdiction and court of Delhi only."

10. The case of the Petitioner is that a plea of the Respondent that sub-Clause 25 of Clause 21 of the Conditions of Contract has been '*deleted*' cannot be accepted for the reason that in other clauses which have been deleted, the clause itself stands deleted. Attention of this Court has been drawn to Clauses 10B, 10CC, 14 of the Clauses of Contract and Clauses 32, 39 & 42 of the Miscellaneous Section wherein the clauses that have been '*deleted*' have been completely removed from the contract including the text of the clauses and only the title of the clauses has been retained with the word '*deleted*'. For example Clause 10B of the Clauses of Contract, reads as



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under:-

"CLAUSE 10B

***SECURED ADVANCE ON NON-PERISHABLE
MATERIALS
DELETED***

***MOBILIZATION ADVANCE
DELETED
PLANT & MACHINERY ADVANCE
DELETED"***

11. It is stated that it is a similar case for other Clauses also. Learned Counsel for the Petitioner states that the entire Clause 25 of the Clauses of Contract has been retained which indicates that the word deleted in Clause 25 of the Clauses of Contract is only a typographical error and the intention must be to retain the clause. Further, it is stated that Clause 22.2 has not been deleted. It is contended that if the intention was to delete the arbitration clause, then Clause 22.2 also ought to have been deleted. The fact that Clause 22.2 has not been deleted which is inter-linked with Clause 25 of the Clauses of Contract only means that Clause 25 has not been deleted. It is stated that if the intention of the SDMC was to delete the entire arbitration clause, then Clause 22.2 would also have been deleted but this has not been done. It is therefore the contention of the Petitioner that it is settled law that if two views are possible, then the courts should be inclined to uphold in favour of the arbitration clause rather than negating it.

12. Learned Counsel for the Petitioner has placed reliance on the judgments passed by the Apex Court in Intercontinental Hotels Group (India) (P) Ltd. v. Waterline Hotels (P) Ltd., **2022 (7) SCC 662** and SK Engineering and Construction Company India v. Bharat Heavy Electricals



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Ltd., **2023 SCC OnLine Del 7575** to substantiate his contentions.

13. The Respondents have filed a counter affidavit which has been signed by the Executive Engineer (Projects-II), West Zone, MCD stating in no unequivocal terms that Clause 25 of the Clauses of Contract having the arbitration clause has been deleted and the fact that the said Clause has been retained in the contract will have no consequence. Along with affidavit an office order dated 11.12.2006 has also been filed which is signed by the Executive Engineer, which reads as under:-

MUNICIPAL CORPORATION OF DELHI
(ENGINEERING DEPARTMENT)

No. D/167/EE.(P)-II/06 Dated: 11/12/06

OFFICE ORDER

Subject:-Deletion of Arbitration clause from General condition of contract.

It has since been decided that ARBITRATION CLAUSE (clause 25 settlement of disputes & Arbitration) in various contract forms being adopted in M.C.D should be deleted with immediate effect. All the NIT approving authorities of Engineering Deptt., Horticulture Deptt. and Deptt. of Environment management services are requested to ensure that all NITs to be approved by them and tender invited hence forth should be without arbitration clause (clause 25 settlement of disputes & Arbitration).

These issues with the approval competent authority.


Ex. Engineer (P)-III

Distribution:-
All concerned (through Chief Engineer)

14. It is stated that a decision has been taken to delete the arbitration clause in the light of various contract forms being adopted by the MCD. It is stated that the fact that it is deleted has been accepted. It is also stated that



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Clause 22.2 finds mention only in the Miscellaneous Section and comes to play only during the execution of the work and in any event does not override Clause 25 of the Clauses of Contract which stands deleted.

15. Heard learned Counsel for the parties and perused the material on record.

16. The short question which arises for consideration is whether the arbitration clause has been deleted or not. The Request for Proposal was issued by the MCD for construction, operation & maintenance of automated multilevel car parking facility. In some clauses viz. Clauses 10B, 10CC, 14 of the Clauses of Contract and Clauses 32, 39 & 42 of the Miscellaneous Section, which are deleted, the entire text has been deleted, whereas Clause 25 of the Clauses of Contract though states that it has been deleted but its text has been retained.

17. The affidavit to this effect has been filed by the Respondent, which is an instrumentality of the State, swearing that this clause has been deleted. There is no occasion for the Court not to accept the stand taken by an instrumentality of the State that the clause stands deleted. The Petitioner while giving his bid has accepted the Clauses of Contract which includes Clause 25 against which it is specifically mentioned '*deleted*' without any demur. Therefore, now it is not open for the Petitioner to have accepted a document without demur, not seek clarification regarding the various conditions of contract more particularly when it expressly states '*deleted*' to contend that the Clause did exist between the parties.

18. On affidavit, it is the stand of the Respondent, which is an instrumentality of the State, that the clause just stands deleted. Though it is stated by the Petitioner that in identical cases as in the present case, SDMC



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contract disputes have been referred to arbitrator, i.e., AMR India Limited v. South Delhi Municipal Corporation & Anr., **2018 SCC Online Del 8243** and M/s JMC Projects (India) Limited v. South Delhi Municipal Corporation, **ARB.P 632/2017**. In both the judgments the issue as to whether the clause has been deleted or not was not in question. There was no contention taken by the SDMC that while entering into the contract that the arbitration clause had been deleted and therefore the parties had agreed to resort to arbitration to adjudicate upon the disputes and both the judgments are not applicable in the present case.

19. The contention of the Petitioner that when in doubt, do refer, i.e., the courts must lean in favour of referring the matter to arbitration would be applied to this case for the reason that in several clauses which have been deleted, the text has been removed unlike Clause 25 of the Clauses of Contract cannot be accepted because there is no doubt and more so in light of the firm stand taken by the Respondent that Clause 25 has been deleted and the Petitioner having entered into the contract with a clause which stands deleted.

20. In view of the specific stand taken on affidavit by the MCD that at the time of entering into the contract, the parties had expressly given up the arbitration clause, this Court is not in a position to accept the argument of the Petitioner that there is a doubt regarding deletion of the arbitration clause. The fact that in other clauses which have been deleted, the text of the clauses stands deleted would be of no consequence. It was for the Petitioner to have clarified the position before entering into the contract that as to whether an arbitration clause does exist between the parties or not. The text in Clause 25 or Clause 22 does exist. Clause 22.2 itself is not a arbitration



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clause for it refers expressly to Clause 25 of the Clauses of the Contract. Clause 22.2 only states that any dispute arisen will be settled as per Clause 25 failing which the matter will be referred for adjudication to local jurisdiction and courts in Delhi. Since Clause 25 stands deleted, the dispute can be referred to adjudication to local jurisdiction of the courts in Delhi.

21. The reliance placed by the Petitioner in SK Engineering and Construction Company India v. Bharat Heavy Electricals Ltd., 2023 SCC OnLine Del 7575 and more particularly in Paragraph 21 of the said judgment wherein a Coordinate Bench of this Court held that while construing an arbitration agreement, the Court must lean in favour of giving effect to the arbitration agreement between the parties as the legislative object and intent of the framers of the Statute is to encourage arbitration, cannot be accepted. In the said case, the arbitration clause reads as under:-

"It is also a term of this contract that no person other than a person appointed by such Head TBG as aforesaid should act as arbitrator and if for any reason that is not possible the matter is not to be referred to the arbitration at all."

22. The stand of the Respondent was that the intention of the parties was that no other person other than a person appointed by the Head TBG should act as an Arbitrator and if for any reason it is not possible, then the matter cannot be referred to arbitration. While interpreting the said clause, the Coordinate Bench of this Court rejected the contention of the Respondent that the disputes cannot be referred to arbitration because the only mode by which the parties could appoint an Arbitrator was if the Head TBG agreed to appoint an Arbitrator. Such is not the case in the case at hand because in the present case, the stand of the Respondent is that the clause itself has been



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deleted which has been agreed to by both the parties at the time of entering into the contract.

23. The Petitioner has not been able to point out any case where even after deletion of the arbitration clause, the Respondent has agreed to arbitration for adjudication of the disputes. Therefore, this Court is not inclined to accept the application and entertain the application under Section 11 of the Arbitration & Conciliation Act.

24. In view of the above, the petition is dismissed along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

OCTOBER 29, 2024

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