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

+ **CS(COMM) 33/2018 & I.A. 11062/2018**

M/S J.S. ENVIRO SERVICES PVT. LTD Plaintiff

Through: Mr. Arun Nischal & Ms. Suchi
Dhupar, Advocate (M-9811563623).

versus

M/S A.G. ENVIRO INFRA PROJECTS PVT. LTD. Defendant

Through: Mr. Hrishikesh S. Chitaley, Mr. Vijay
Kari Singh & Mr. Ashish Verma,
Advocates (M-9595153639).

CORAM:

JUSTICE PRATHIBA M. SINGH

ORDER

% **05.12.2018**

1. The Plaintiff - M/s J.S. Enviro Services Pvt. Ltd. has filed the present suit for recovery and damages for breach of contract against the Defendant - M/s A.G. Enviro Infra Projects Pvt. Ltd. The case of the Plaintiff is that an agreement dated 1st May, 2015 was entered into between the Defendant and the MCD, on the basis of which services were assigned further to the Plaintiff. The services related to collection, segregation, transportation and disposal of municipal solid waste.

2. Disputes arose between the parties in respect of payments which were due to be made to the Plaintiff by the Defendant. It is the case of the Plaintiff that out of the total dues of Rs.3,58,32,470/-, only a sum of Rs.89,34,716/- has been paid to the Plaintiff. Despite repeated e-mails and requests, the pending payment was not cleared. Thereafter, the Defendant terminated the

contract w.e.f. April, 2017. The case of the Plaintiff is that it suffered huge losses and thus it prays for the following reliefs:

“(a) Pass a decree for Recovery to the tune of Rs. 2,49,79,751/-(two crore forty nine lacs seventy nine thousand seven hundred and fifty one only) along with interest at the rate of 9% per annum till the actual realization of amount against the defendant and in favor of the plaintiff;

(b) Pass a decree for damages for breach of contract to the tune of Rs.2,50,00,000/- (rupees two crore fifty lakh only) in favour of the plaintiff and against the defendant;

(c) Cost of litigation and court fee;

(d) pass any other Order(s) which this Hon'ble Court may deem fit and proper.”

3. The Defendant has raised a preliminary issue as to the maintainability of the suit on the ground that there exists a Dispute Resolution Clause in the contract. The said clause for resolution of disputes in the agreement dated 1st May, 2015 reads as under:

“DISPUTES: Disputes, if any, shall be amicably resolved by the MD of the “First Party” and decision of the MD of “First Party” shall be final and binding on the parties.”

4. The Ld. Counsel for the Defendant submits that in accordance with the judgment in ***Punjab State & Ors. v. Dina Nath (2007) 5 SCC 28***, the above clause constitutes an arbitration agreement. It is further submitted that the Defendant is willing for an independent Arbitrator to decide the disputes instead of the Managing Director of the Defendant.

5. The matter was earlier adjourned to enable the Plaintiff's counsel to take instructions. On 3rd December, 2018, Ld. counsel for the Plaintiff

submitted that his client is not willing for appointment of an independent Arbitrator. In fact, the Plaintiff wishes to urge that the suit is maintainable as there is no arbitration agreement between the parties. He submits that a plain reading of the clause itself shows that it was never intended by the parties that the Managing Director of the Defendant would himself become the Arbitrator. The Ld. Counsel relies upon a very recent judgment of the Supreme Court in ***South Delhi Municipal Corporation v. SMS AAMW Tollways Private Ltd. (Civil Appeal no.11249/2018 decided on 22nd November, 2018).***

6. Further submissions have been heard today. Counsel for the Defendant has relied upon two judgments of the Supreme Court in ***Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Limited (2017) 4 SCC 665*** and ***TRF Limited v. Energo Engineering Projects Limited (2017) 8 SCC 377***. According to Ld. Counsel, if the Arbitrator contained in the clause is disqualified for any reason contained in the Fifth Schedule, the Court is not powerless to appoint an independent Arbitrator.

7. Ld. Counsel for the Plaintiff further submits that the conduct of the Defendant is contradictory in nature inasmuch as on the one hand, the Defendant has denied the agreement in the admission/denial of the documents, however, on the other hand, has chosen to rely on the arbitration clause.

8. This Court has heard the counsels for the parties. The Defendant firstly does not dispute the existence of the clause for dispute resolution as extracted herein above. There may be other grounds on the basis of which the Defendant disputes the contents/binding nature of the agreement dated 1st May, 2015. Ld. Counsel for the Defendant submits that the reason why

the binding nature of the agreement is denied is because of the persons who had executed it, who as per the Defendant were not duly authorised. Insofar as the dispute resolution clause is concerned, the same being an independent clause, distinct and separate from the other clauses in the agreement itself, the Defendant does not dispute its existence. Insofar as the question as to whether the arbitration agreement exists between the parties is concerned, a perusal of the clause shows that it has four distinct elements:

- i) The word ‘disputes’ appears in the clause and ‘*disputes, if any*’ is not restricted to any dispute raised by any one party, but allows for disputes raised by both the parties.
- ii) The word ‘resolved’ appears in the clause, which means that there is an amicable resolution/adjudication which is contemplated.
- iii) The word ‘decision’ is also referred to in the clause, i.e., the clause contemplates a proper decision after the adjudication process.
- iv) The clause also mentions the final and binding nature of the said decision.

9. All the above four elements point to the fact that the parties clearly agreed for a dispute resolution clause.

10. The said clause, as per the dictum of the Supreme Court in ***Punjab State (supra)***, clearly constitutes an arbitration clause. In ***Punjab State***, the Supreme Court clearly observed that the word ‘Arbitration’ need not appear in a clause in order to constitute an arbitration agreement. The Court has to consider the dispute resolution clause in entirety and come to a conclusion as to whether an agreement to refer disputes to arbitration exists or not.

11. Insofar as the judgment of the Supreme Court in ***South Delhi Municipal Corporation v. SMS AAMW Tollways Private Ltd. (supra)***

relied upon by the Plaintiff is concerned, the dispute resolution clause in the said case reads as under:

“16. DISPUTE RESOLUTION

16.1 Except where otherwise provided in the Agreement, all questions and disputes in any way arising out of or relating to the Agreement shall be dealt with as mentioned below.

16.2 In the event the Contractor considers any work demanded of it as being outside the requirements of the Agreement, or disputes any record or decision given in writing by the Competent Officer in any matter in connection with or arising out of the Agreement, to be unacceptable, it shall promptly within [15] days request the Competent Officer in writing to give his instructions or decision in respect of the same. Thereupon, the Competent Officer shall give his written instructions or decision within period of [30] days from the receipt of the Contractor’s letter.

16.3 If the Competent Officer 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 Competent Officer, the Contractor may, within [15] days of receipt of the Competent Officer’s instructions or decision, appeal to the Commissioner who shall afford an opportunity to the Contractor to be heard, if the latter so desires, and to offer evidence in support of its appeal. The Commissioner shall give his decision in writing within [30] days of receipt of Contractor’s appeal which shall be acceptable to the Contractor.”

12. In the context of the above clause, the Supreme Court came to the following conclusion in paras 21 and 24, which read as under:

“21. This was relied on by the Respondent-SMS AAMW to support the submission that Clause 16.3 does not provide for an appeal to the Commissioner but provides for arbitration by the Commissioner. The

passage above clearly contemplates that an arbitration should be an enquiry in the nature of a judicial enquiry i.e. an enquiry which involves hearing both the parties. The appeal involved in the present case clearly does not involve hearing both the parties. On the contrary, the authority which decides the appeal is in a sense the other party. The Commissioner is a higher officer than the Competent Officer in the same organization. It is, therefore, clear that the appeal to the Commissioner is not intended to provide a forum for a decision by an impartial adjudicator but is only intended to ascertain some matter for the purpose of preventing differences from arising and not for settling them after they have arisen. It is thus clear that the Commissioner is not intended to be an arbitrator, as his jurisdiction cannot be invoked by both parties.

24. We find that the present Clause 16 and in particular Clause 16.3 does not provide for the reference of any dispute that may arise between the parties to an Arbitrator. The purpose of this Clause is to vest the Competent Officer and the Commissioner with supervisory control over the execution of work and administrative control over it from time to time and thus to prevent disputes. The intention is not to provide for a forum for resolving disputes. Thus, in the present circumstances no Arbitrator could have been appointed by the High Court under Section 11(6) of the Arbitration and Conciliation Act, 1996, therefore, the impugned order dated 17.06.2016 is set aside.”

13. The finding of the Supreme Court is clearly that the clause vests the Competent Officer with supervisory control over the execution of the work and administrative control in order to prevent disputes. Thus, the clause in ***South Delhi Municipal Corporation (supra)*** did not contemplate raising of disputes of both parties and thereafter adjudication of disputes of both sides. It merely provided for firstly the contractor to raise any issues before the

Competent Officer and then if the contractor had a grievance, an appeal to the Commissioner could be preferred by the Contractor. It was in this context that the finding of the Supreme Court that this was not a dispute resolution clause was arrived at.

14. The clause in the present case is completely different from the clause in the **SDMC (supra)** case. The clause in the present case in fact is similar to the clause which appears in the **Punjab State v. Dina Nath** (supra) which reads as under:

“Any dispute arising between the department and the contractor/society shall be referred to the Superintending Engineer, Anandpur Sahib, Hydel Circle No.1, Chandigarh for orders and his decision will be final and acceptable/binding on both the parties.”

15. For the above reasons, it is held that there exists an arbitration agreement between the parties.

16. The Managing Director of the Defendant is obviously a person who would be disqualified in the Fifth Schedule of the Act as he has a direct interest and relationship between the parties. In these circumstances, as held in para 18 of **Voestalpine Schienen GMBH (supra)**, the Court may appoint the Arbitrator as may be permissible. The relevant portion of the judgment is extracted herein below:

“18. Keeping in mind the aforequoted recommendation of the Law Commission, with which spirit, Section 12 has been amended by the Amendment Act, 2015, it is manifest that the main purpose for amending the provision was to provide for neutrality of arbitrators. In order to achieve this, Sub-section (5) of Section 12 lays down that notwithstanding any prior agreement to

the contrary, any person whose relationship with the parties or counsel or the subject matter of the dispute falls under any of the categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. In such an eventuality, i.e., when the arbitration clause finds foul with the amended provisions extracted above, the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator(s) as may be permissible. That would be the effect of non obstante clause contained in sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of arbitration agreement.”

17. Under these circumstances, the Defendant having agreed and conveyed its no objection for appointment of an independent Arbitrator, as also the fact that the Managing Director is disqualified to act as an Arbitrator, this Court is of the opinion that the disputes between the parties can be resolved through arbitration by an independent Arbitrator. A similar view has been taken by this Court in ***Ashoo Decor (India) v Ajay Enterprises Pvt Ltd. CS (COMM) 1192/2016 (Decided on 3rd October, 2018).***

18. Accordingly, Justice S.P. Garg (Retd.) is appointed as a Sole Arbitrator to adjudicate the disputes between the parties. The fee of the Ld. Arbitrator shall be determined as per the Schedule in the Act and the timelines shall be determined as per the Act.

19. The suit is disposed of in the above terms. All pending I.As are also stand disposed of. Copy of this order be communicated to the Ld. Arbitrator.

PRATHIBA M. SINGH, J.

DECEMBER 05, 2018/Rahul