

SUPREME COURT OF INDIA

South Delhi Municipal Corporation

Vs.

SMS AAMW Tollways Private Ltd.

C.A.No.11249/2018

(S.A.Bobde and L.Nageswara Rao,JJ.,)

22.11.2018

JUDGMENT

S.A.Bobde,J.,

SLP(Civil)No.23139 of 20161

1. Leave granted.

2. The Appellant-South Delhi Municipal Corporation (hereinafter referred to as 'SDMC') has challenged the impugned order dated 17.06.2016 passed by the learned Single Judge of the Hon'ble High Court of Delhi, New Delhi in Arbitration Petition No. 475/2015. By that order, the learned Single Judge allowed the Petition filed by the fed Respondent-SMS AAMW Tollway Private Ltd. (hereinafter referred to as 'SMS AAMW') under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act').

Brief Facts

3. The National Highways Authority of India (hereinafter referred to as 'NHAI') entered into a State Support Agreement (hereinafter referred to as 'the SSA') dated 27.5.2004/22.2.2005 with M/s Jaypee-DSC Ventures Limited (hereinafter referred to as 'Concessionaire') for the design, engineering, financing, procurement, construction, completion, operation, maintenance and the toll collection of certain sections of the NH-8 highway.

4. The arrangement under the SSA was that the Concessionaire of the NHAI shall not only collect the toll under the concession agreement executed between NHAI and its Concessionaire, but also the entry toll (toll tax) levied by the Appellant-SDMC on entry of specified commercial vehicles into the territory of NCT of Delhi. The Appellant-SDMC is a 'designated agency' of the Government of NCT of Delhi under the SSA.

5. The Appellant-SDMC, for the purpose of collection of toll tax from all border entry points within the NCT of Delhi, decided to engage a contractor and accordingly floated a tender,

inviting bids from interested parties. The Respondent-SMS AAMW being the successful bidder was awarded the work for collection of toll tax for a period of 3 years and a Bilateral Agreement dated 14.05.2011 (hereinafter referred to as 'the Agreement') was entered into between the Appellant-SDMC and the Respondent-SMS AAMW.

6. As per the Agreement, the Respondent-SMS AAMW was obliged to pay an amount of Rs.26 crores every month to the Appellant-SDMC in lieu of the tax collected from all entry points within the NCT of Delhi. However, the said toll tax for Rajokri integrated toll plaza was said to be collected vide the mechanism set out under the SSA i.e. it will be collected by the NHAI's Concessionaire and passed on to the Respondent-SMS AAMW.

7. Thereafter, on 19th February 2014, the Rajokri integrated toll plaza was dismantled, apparently, as a result of an understanding between the parties to the SSA. It is the case of Respondent-SMS AAMW that due to this situation, it was forced to incur the expenses to arrange for the collection of the Appellant-SDMC's toll tax from the Rajokri Integrated toll plaza. As a result, the Respondent-SMS AAMW suffered a huge loss amounting to approximately Rs.80 crore.

8. Thereafter, a notice of Arbitration dated 09.03.2015 was sent by the Respondent-SMS AAMW to the Appellant-SDMC, and to the other parties under the SSA, detailing the issues and disputes that had arisen under Clause 9 of the SSA. The Appellant-SDMC vide letter dated 7.5.2015 raised a demand of Rs.97,08,76,449/- against the Respondent-SMS AAMW. To this Respondent-SMS AAMW responded vide letter dated 11.05.2015, clarifying the mistakes in computation, by the Appellant-SDMC. Thereafter, Appellant-SDMC reconciled the accounts and reduced the demand to Rs.80,46,31,504/- vide letter dated 13.05.2015.

9. The Respondent-SMS AAMW being dissatisfied with the decision contained in the letter dated 13.05.2015, preferred an appeal under Clause 16.3 of the Agreement vide letter dated 26.05.2015. Subsequently, the Appellant-SDMC vide letter dated 17.06.2015, intimated to the Respondent-SMS AAMW that since there is no arbitration clause in existence between the parties, the arbitration is not acceptable.

10. However, the Respondent-SMS AAMW filed the Arbitration Petition No.475/2015 under Section 11(6) of the Act before the High Court of Delhi for appointment of an Arbitrator relying on Clause 9 of the SSA and Clause 16 of the Agreement dated 14.05.2011. The learned Single Judge of Delhi High Court allowed the petition filed by the present Respondent-SMS AAMW under Section 11(6) of the Act, and appointed Justice Deepak Verma, Former Judge of this Court as the sole Arbitrator.

11. The decision of this case turns on the answer to the question whether Clause 16.3 of the Agreement dated 14.05.2011 between the Appellant-SDMC on the one hand and the Respondent-SMS AAMW on the other hand contains an agreement for arbitration.

12. The Agreement dated 14.05.2011 provides for the various mutual rights, liabilities and obligations of the two parties for the collection of toll tax from specified commercial vehicles at all border entry points within the NCT of Delhi.

Clause 16 of the Agreement in its entirety reads as follows: -

“ 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 a 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."

13. Furthermore, Clause 20 which makes reference to disputes arising out of the agreement reads as follows:

“20. MISCELLANEOUS PROVISIONS

20.1 Governing Laws and Jurisdiction

(a)

(b) AH disputes arising out of this Agreement shall be subject to sole and exclusive jurisdiction of the courts of Delhi only."

14. Thus, from a plain reading of Clause 16 one can see that it provides for the resolution of disputes at two stages. First, by the Competent Officer of the SDMC vide Clause 16.2 followed by the Commissioner of the Municipal Corporation vide Clause 16.3.

The First Stage: -

If a case arises wherein a Contractor finds that if the work demanded is outside the scope of the agreement or feels the need to dispute any decision of the Competent Officer or if any record created by him is unacceptable, he may request the Competent Officer to decide its representation or give instructions. The Competent Officer is obliged to decide within 30 days from the receipt of such a letter from the Contractor.

The Second Stage: -

If the Competent Officer fails to decide within 30 days or if the Contractor is dissatisfied with his decision, the Contractor may, within 15 days from receipt of the decision by the Competent Officer, file an appeal to the Commissioner, SDMC. The Commissioner is obliged to afford an opportunity to the Contractor to be heard and the Contractor is entitled to produce evidence in support of this case. At this stage, the Commissioner may give his decision in writing within 30 days. The clause makes the decision compulsorily 'acceptable' to the Contractor presumably meaning that it shall be binding on him.

15. In the present case as stated earlier, the notice of arbitration was sent by the Contractor on 09.03.2015 under the SSA. By letter dated 26.05.2015, the Contractor i.e. SMS AAMW filed an appeal under Clause 16.3 of the Agreement. This appeal was preferred against the decision contained in the letter of the Competent Officer, SDMC dated 13.05.2015. The Appellant-SDMC sought to produce additional evidence and further sought that the decision should be taken under Clause 16.3. There is no doubt that the Respondent-SMS AAMW resorted to the provision of appeal against the decision of the Appellant-SDMC in its letter dated 13.05.2015. In that letter, they did not seek the appointment of an arbitrator but merely sought decision by an officer higher in rank than the members of high level committee, akin to invoking an appellate provision.

16. The question before us is whether Clause 16.3 which provides for an appeal really provides for an arbitration and therefore whether the High Court was entitled to appoint an Arbitrator under Section 11(6) of the Act.

17. It is necessary to advert to certain features of Clause 16 to determine whether the clause provides for arbitration or a departmental appeal. Firstly, Clause 16.3 under which an application to appoint an Arbitrator under Section 11(6) of the Act was made is described as an appeal in the said Clause. It is a settled principle of interpretation that unless the word raises an ambiguity it is not necessary to consider another meaning. Indeed, it is an appeal since the Contractor is entitled to take recourse to appeal, if the Contractor is dissatisfied with the decision of the Competent Officer including a possible failure to decide within the prescribed period i.e. within 30 days. It is significant, that the appellate provision can be invoked only by the Contractor dissatisfied by the decision of the Competent Officer. The other side, i.e. a Competent Officer who has raised a demand which the Contractor has not complied with cannot file such an appeal. The right of appeal is restricted to a dissatisfied Contractor only. And that too upon a failure to obtain *redressal under Clause 16.2*!

18. This mechanism is clearly an appeal in the nature of a departmental appeal commonly provided in several department rules including service rules. Such departmental appeals are invariably decided by a designated officer and can only be invoked by a dissatisfied party such as a contractor or an employee. Such appellate powers obviously cannot be invoked by parties unless the language of the provision setting up the appeal provides for it expressly or by necessary implication. It is settled law that a right of appeal is a creature of statute and can only be exercised in the manner *provided by the statute*².

19. We see no reason, why this Court should adopt a different approach while construing a clause in a contract executed by a statutory body and providing for an appeal. The language of Clause 16.3 does not lend itself to any other construction other than that it provides for an appeal against the decision of a Competent Officer rendered under Clause 16.2.

20. The Respondent-SMS AAMW placed reliance on the following passage from Russell on Arbitration, which reads as follows: -

"if it appears from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an enquiry in the nature of a judicial enquiry and hear the respective cases of the parties and decide upon evidence laid before him, then the case is one of an arbitration. The intention in such case is that there shall be a judicial inquiry worked out in a judicial manner. On the other hand, there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of setting them when they have arisen."

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.

22. Arbitration has always been understood to mean the process by which a dispute is resolved by an arbitrator chosen or acceptable to both sides under an arbitration agreement between the two parties. In the present case, under Clause 16 of the Agreement only the party dissatisfied by the order of the Competent Officer can approach the Commissioner. It is, therefore, not possible to hold that the proceedings before the Commissioner constitutes as an arbitration. In *K.K. Modi v. K.N. Modi*³, this Court observed as follows: -

"17. Among the attributes which must be present for an agreement to be considered as an arbitration agreement are:

- (1) The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement,
- (2) that the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration,
- (3) the agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal,
- (4) that the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides,
- (5) that the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,
- (6) the agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.

18. The other factors which are relevant include, whether the agreement contemplates that the tribunal will receive evidence from both sides and hear their contentions or at least give the parties an opportunity to put them forward; whether the wording of the agreement is consistent or inconsistent with the view that the process was intended to be an arbitration, and whether the agreement requires the tribunal to decide the dispute according to law."

23. The scope of Clause 16 is limited. Clause 16.1 provides that all the questions and disputes arising out of the Agreement shall be dealt with as follows i.e. as provided in Clause 16.2 and Clause 16.3. Clause 16.2 enables a Contractor to request the Competent Officer to give his instructions or decisions in writing, in case of either when (a) the Contractor considers any work demanded of him as being outside the requirements of the Agreement, or (b) disputes any record or decision given in writing by the Competent Officer in connection to the Agreement as unacceptable. The Competent Officer is enjoined to give his written instructions or decisions within a period of 30 days. He enjoys complete discretion in deciding the dispute. Clause 16.3 provides that in case of an instance whereby the Competent Officer does not come to a decision, the Contractor may appeal to the Commissioner who shall afford an opportunity to the Contractor to be heard and offer evidence. Neither the Competent Officer nor the Commissioner is enjoined to act judicially i.e. the decision on the basis of evidence adduced by both the parties. In fact, both the authorities, the Competent Officer and the Commissioner are required to deal with only one party i.e. the Contractor. This cannot be characterized as an enquiry of a judicial nature which necessarily involves a

consideration of the case of both sides by an independent Arbitrator. Additionally, there is no provision in Clause 16.3 of the Agreement to refer any dispute or reference to arbitration. In *State of Orissa v. Damodar Das*⁴ this Court approved the following observations in *State of U.P. v. Tipper Chand*: -

"11. This Court was called upon to consider a similar clause in *State of U.P. v. Tipper Chand* The clause was extracted therein. After consideration thereof, this Court held that after perusing the contents of the said clause and hearing learned counsel for the parties

"we find ourselves in complete agreement with the view taken by the High Court. Admittedly, the clause does not contain any express arbitration agreement. Nor can such an agreement be spelt out from its terms by implication, there being no mention in it of any dispute, much less of a reference thereof. On the other hand, the purpose of the clause clearly appears to be to vest the Superintending Engineer with supervision of the execution of the work and administrative control over it from time to time."

It would, thereby, be clear that this Court laid down as a rule that the arbitration agreement must expressly or by implication be spelt out that there is an agreement to refer any dispute or difference for an arbitration and the clause in the contract must contain such an agreement. We are in respectful agreement with the above ratio. It is obvious that for resolution of any dispute or difference arising between two parties to a contract, the agreement must provide expressly or by necessary implication, a reference to an arbitrator named therein or otherwise of any dispute or difference and in its absence it is difficult to spell out existence of such an agreement for reference to an arbitration to resolve the dispute or difference contracted between the 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.

25. The appeal is accordingly allowed.

Judgment Referred.

¹(Ref. *Corporation of the City of Nagpur v. Employees* AIR 1960 SC 675, *Nelson Motis v. Union of India* (1992) 4 SCC 711, *Nathi Devi v. Radha Devi Gupta* (2005) 2 SCC 2

²(Ref. *Ganga Bai v. Vijay Kumar* (1974) 2 SCC 393, *State of Haryana v. Maruti Udyog Ltd.* (2000) 7 SCC 348, *Raj Kumar Shivhare v. Directorate of Enforcement* (2010) 4 SCC 772)

³(1998) 3 SCC 0573
⁴(1996) 2 SCC 0216