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

\+ O.M.P. (COMM) 291/2021 & I.A. 12778/2021, I.A. 12779/2021, I.A. 12780/2021

DELHI TRANSPORT INFRASTRUCTURE DEVELOPMENT CORPORATION LTD. ..... Petitioner

Through: Mr. Amiet Andlay, Adv.

versus

M/S AOM ADVERTISING PVT. LTD. ..... Respondent

Through: Mr. S.P.Singh, Adv.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T (ORAL)

% 07.12.2021

1. This petition, under Section 34 of the Arbitration and Conciliation Act, 1996 ("1996 Act"), at the instance of the Delhi Transport Infrastructure Development Corporation Ltd. (DTIDC), assails order dated 10th September, 2021, passed by a three-member Arbitral Tribunal, rejecting the application, under Section 16 of the 1996 Act, preferred by the petitioner before it.

2. The disputes, which arise out of three Concession Agreements dated 5th December, 2017, executed between the petitioner and the respondent, are presently in *seisin* before the learned Arbitral Tribunal. The respondent is the claimant before the learned Arbitral Tribunal and the petitioner is the respondent before it.

3. The respondent, in its Statement of Claim before the learned Arbitral Tribunal, consolidated its claims in respect of the three Concession Agreements. The petitioner, thereupon, moved an application under Section 16 of the 1996 Act, objecting to the consolidation of the claims and contending that the learned Arbitral Tribunal would have to treat each claim as a separate arbitrable dispute, and therefore, could not consolidate the claims. It is this application that has come to be dismissed by the order impugned in the present case.

4. Mr. Amiet Andlay, learned counsel for the petitioner, submits that he has no objection to the respondent filing separate Statements of Claims before the learned Arbitral Tribunal *qua* its claims in respect of each Concession Agreement and the learned Arbitral Tribunal treating them as a separate dispute for the purpose of arbitration. He, however, opposes the consolidation of the claims as has been done by the learned Arbitral Tribunal and, therefore, submits that the rejection of his Section 16 application was erroneous.

5. The Concession Agreements between the petitioner and the respondent relate to marketing, operation and maintenance of various bus queue shelters (BQS). The shelters were divided into three Zones; Zone-2, Zone-4 and Zone-5. Though, initially, a consolidated Request For Proposal (RFP) was issued by the petitioner, inviting tenders for service providers for all the three Zones, thereafter, consequent on the respondent emerging as the successful bidder, three separate Concession Agreements were executed between the petitioner and the

respondent, one for each Zone, all of which were dated 5th December, 2017.

6. Two Bank guarantees, for each zone, were also furnished by the respondent, as required by each Concession Agreement.

7. The petitioner alleges that the respondent was in default of licence fee payable under the Concession Agreements, whereupon the petitioner issued notices to the respondent on 6th June, 2020, 18th June, 2020 and 8th July, 2020. These notices, it is asserted, were separately issued for each Concession Agreement, i.e. for each zone.

8. Each Concession Agreement contains its own arbitration clause, though they were identical. The arbitration clause may be reproduced thus:

> "**23.1 Amicable Resolution**
>
> Save where expressly stated to the contrary, in this Agreement, any dispute, difference or controversy of whatever nature between the Parties, howsoever arising under, out of or in relation to this Agreement (the "**Dispute**") shall in the first instance be attempted to be resolved amicably in accordance with the procedure set forth in sub-clause (b) below.
>
> (b) Either Party may require such Dispute to be referred to the Chairman DTIDCL and the Chief Executive Officer of the Concessionaire for the time being, for amicable settlement. Upon such reference, the two shall meet at the earliest mutual convenience and in any event within 15 days of such reference to discuss and attempt to amicably resolve the Dispute. If the Dispute is not amicably settled within 15 days of such meeting between the two, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 23.2 below.

23.2 Arbitration

a) **Procedure**

Subject to the provisions of clause 23.1, any dispute, which is not resolved amicably, shall be finally settled by binding arbitration under the Arbitration Act. The arbitration shall be by a panel of three arbitrators, one to be appointed by each Party and the third to be appointed by the two arbitrators appointed by the Parties The Party requiring arbitration shall appoint ail arbitrator in writing, inform the other Party about such appointment and call upon the other Party to appoint its arbitrator. If within 15 days of receipt of such intimation the other Party fails to appoint its arbitrator, the Party seeking appointment of arbitrator may take further steps in accordance with Arbitration Act.

(b) **Place of Arbitration**

The place of arbitration shall ordinarily be Delhi but by agreement of the Parties, the arbitration hearings, if required. May be held elsewhere."

9. The respondent, *vide* letter dated 6th January, 2021, invoked Article 23.2 of each of the Concession Agreement, in a consolidated fashion, and suggested the name of its nominee arbitrator. Subsequently, soon thereafter, the respondent moved OMP (I) (Comm) 6/2021 before this Court under Section 9 of the 1996 Act, seeking pre-arbitral interim reliefs.

10. During the pendency of OMP (I) (Comm) 6/2021, the petitioner addressed the following communication to the respondent on 13th April, 2021:

"To

M/s AOM Advertising Pvt. Ltd.

1515, 15th Floor
89, Hemkunt Chamber
Nehru Place, New Delhi-110019

Subject: **"Marketing, Operation and Maintenance of 431 Bus Queue Shelters (BQSs) in Delhi Project, Zone - 2, 4 and 5 on PPP basis**

This is in reference to your letter dated: 26.03.2021 received in this office on 31.03.2021 wherein you have preferred invocation of arbitration under Clause 23.2 of the agreement and appointed Arbitrator Dr. Kedarnath Tripathi, Advocate-on-record from your side for the subject matter "sMarketing, Operation and Maintenance of 431 Bus Queue Shelters (BQSs) in Delhi Project, Zone - 2, 4 and 5 on PPP basis.

In this regard, I am directed to intimate you that DTIDC has also appointed Arbitrator Sh. S.N. Dhingra, Rtd. Justice Delhi High Court from DTIDC side.

Executive Engineer (C)/
AGM (Works)
DTIDC"

11. By order dated 28th May, 2021, this Court disposed of OMP (I) (Comm) 6/2021, with a direction to the learned arbitrators appointed by the parties to appoint a presiding arbitrator and leaving all questions of fact and law open to be decided by the Arbitral Tribunal, thus constituted. Subsequently, the two learned arbitrators appointed Hon'ble Mr. Justice S.K. Agarwal, a learned retired Judge of this Court, as the Presiding Arbitrator and the Arbitral Tribunal, thus constituted, entered on the reference.

12. Subsequent to constitution of the Arbitral Tribunal, Statement

of Claim was filed by the respondent, as the claimant, before the learned Arbitral Tribunal.

13. The petitioner, thereupon, moved an application under Section 16 of the 1996 Act, objecting to consolidation of the claims by the respondent and submitting that the claims pertaining to each zone and, therefore, covered by distinct Concession Agreements, were required to be arbitrated as separate disputes and that the learned Arbitral Tribunal could not consolidate the claims.

14. As noted hereinabove, this application of the petitioner has come to be dismissed by the learned Arbitral Tribunal by the order under challenge.

15. The reasoning adopted by the learned Arbitral Tribunal, in rejecting the petitioner's application, is to be found in the following paragraphs:

> "**5.** In order to appreciate the rival contentions, it will be useful to Recall Order 2 Rule 3 of CPC, 1908, which reads:
>
> > **"3. Joinder of causes of action.-** (1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.
> >
> > (2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit."

(emphasis supplied)

6. Order 2 Rule 3 of CPC is an enabling provision and it enables the Plaintiff/Claimant to include and club in the same suit/claim several causes of action against the same defendant. In other words, the aggrieved party has the discretion to dub or not to club, the causes of action in one claim petition for adjudication through the arbitration. The purpose of this Rule is to avoid multiplicity of suits. Further, Section 19(1) of Arbitration and Conciliation Act, 1996 provides that the arbitral tribunal is not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872. The words "shall not be bound" in Section 19(1) are the words amplitude and not restrictions. In this regard, reference may be made to the Supreme Court decision in *SREI Infrastructure Finance Limited vs Tuff Drilling Private Limited* (2018)11 SCC 470, the relevant paragraph of the judgment read as follows:

> "15. Section 19 of the Act provides for determination of Rules of procedure. Sub-clause (1) of Section 19 provides that the arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872. The words "arbitral tribunal shall not be bound" are the words of amplitude and not of a restriction. These words do not prohibit the arbitral tribunal from drawing sustenance from the fundamental principles underling the Code of Civil Procedure or Indian Evidence Act but the tribunal is not bound to observe the provisions of Code with all of its rigour. As per Sub-clause (2) of Section 19 the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings."
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> (emphasis supplied)

7. In this case, it is not in dispute that all the three Concession Agreements in respect of Zones 2, 4 & 5 are of the same date i.e. 05.12.2017 and contain exactly similar terms, except the license fee. The Respondent vide letter dated 06.11.2020, demanded consolidated payment of Rs. 4,l1,85,948/- plus interest thereon, in terms of the relevant clauses of the Agreements. The Respondent again vide Notice dated 17.12.2020 demanded consolidated payment of arrears

of the said amount plus interest thereon amounting to Rs.4,29,30,309/- and vide letter dated 05.01.2021, intimated to the bank regarding forfeiture of all the six Bank Guarantees in respect of the said three Concession Agreements of Zones 2, 4 & 5 on PPP basis in lieu of advertising rights (Annexure-C7, 8 & 9 respectively). In view of the above, in our considered view the Claimant is well within its rights to club the claims in the Statement of Claim arising out of three Concession Agreements in respect of "Marketing Operation and Maintenance of bus Queue Shelters (BQS) in Zone 2, 4 & 5 on PPP basis".

8. It is not the case of the Respondent that the joinder of causes of action by the Claimant would in any manner prejudice their defense or delay the proceeding. Learned counsel for the Respondent in support of his contention placed reliance on the order dated 26.09.2017 passed by another Hon'ble Arbitral Tribunal directing the Claimant to file tripartite the claims Zonewise. But there is nothing in the order to show that the provision of Order 2 Rule 3 CPC and Section 19 of Arbitration and Conciliation Act, 1996 were brought to the notice of the Tribunal. In view of the same it cannot be of any help to the Respondent and each case depends on its own facts.

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10. For the foregoing reasons, there is no merit in the Respondent's application and the same is dismissed. The procedural directions for completion of pleadings etc. are being separately passed in the today's proceedings."

16. I have heard Mr. Amiet Andlay, learned counsel for the petitioner, and Mr. N.P. Singh, learned counsel for the respondent, at length.

17. Mr. Andlay submits that the view taken by the learned Arbitral Tribunal, in the impugned order, is directly contrary to the law laid down by the Supreme Court in ***Duro Felguera S.A v. Gangavaram***

Port Ltd[1]. He submits that, in the said decision, the Supreme Court has clearly held that, in the absence of an agreement to the contrary between the parties, separate agreements have to constitute the subject matter of separate arbitral proceedings. He has drawn my attention to Clauses 1.2, 2.1, 10.2, 11.1 and 17.1.1 of one of the Concession Agreements – the Clauses being identical in all the Concession Agreements – to emphasise that each agreement was limited to its own covenants. Specifically with respect to Clause 17.1.1, Mr. Andlay points out that default, too, was envisaged on an agreement-wise basis. Pointing out that the respondent was seeking to avail the benefit of *force majeure*, consequent to the Covid-19 pandemic, Mr. Andlay has drawn my attention to Clause 15.2.1(b) thereof, which reads thus:

> "**15.2 Duty to report Force Majeure Event**
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> **15.2.1** Upon occurrence of a Force Majeure Event, the Affected Party shall by notice report such occurrence to the other Party forthwith. Any notice pursuant hereto shall include full particulars of
>
> xxx
>
> (b) the estimated duration and the effect or probable effect which such Force Majeure Event is having or will have on the Affected Party's performance of its obligations under this Agreement;"

18. As such, submits Mr. Andlay, even the applicability of the *force majeure* was envisaged, in each agreement, specific to that agreement. The respondent, if it desired to avail the benefit of *force majeure*, would, therefore, have to point out that, owing to *force majeure*, it was unable to perform that particular agreement. There could be no

[1] **2017 9 SCC 729**

question of pleading of *force majeure* in a consolidated fashion, spanning all the agreements.

19. As such, Mr. Andlay submits that the impugned order cannot sustain.

20. Responding to the submissions of Mr. Andlay, Mr. Singh, learned counsel for the respondent, advances a preliminary objection to the maintainability of the present petition, contending that the impugned order was not an "award" or even an "interim award" within the meaning of Section 34 of the 1996 Act. As such, he submits that the present petition is not maintainable.

21. Mr. Singh has also invited my attention to the fact that, till the raising of the objection by the petitioner, the petitioner had also been consolidating issues in respect of all the agreements. He points out that the RFP was issued in a consolidated fashion covering all the work, and the communication dated 13th April, 2021, from the petitioner to the respondent, in response to the notice of the respondent invoking arbitration, was also issued in respect of Zones 2, 4 and 5. As such, he submits, the petitioner had agreed to consolidate arbitral proceedings in respect of all agreements and could not, therefore, seek to object to the consolidation of the arbitration at this stage. He also submits that, even at the time when OMP (I) (Comm) 6/2021 was disposed of by this Court on 28th May, 2021, the petitioner did not oppose to a consolidated arbitration. The demand in fact, he submits, was for a composite reference to arbitration.

22. In view thereof, Mr. Singh submits that the reliance, by the petitioner, on ***Duro Felguera***[1] is misplaced.

23. In rejoinder, Mr. Andlay answers the submission regarding maintainability of the present petition by relying on the judgment of the Supreme Court in ***Indian Farmers Fertilizer Co-operative Ltd v. Bhadra Products***[2], to contend that the present petition is maintainable.

Analysis

24. On merits, in my view, there can be no gainsaying, the effect of the judgment of the Supreme Court in ***Duro Felguera***[1]. The Supreme Court has, in that case, clearly held that disputes arising under separate agreements, if referred to arbitration, have to be arbitrated separately unless the parties, *ad idem*, agree to the contrary. The following passage, from the said decision, merits reproduction in this regard:

> "**49.** On the facts of the instant case, there is no dispute that there are five distinct contracts pertaining to five different works. No doubt that all the works put together are for the expansion of facilities at Gangavaram Port. However, the parties took a conscious decision to split the works which led to five separate contracts and consequently an arbitration clause in each split contract was retained. The sixth one, namely, the Corporate Guarantee also contains an arbitration clause.
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> *****
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> **60.** In the case at hand, there are six arbitrable agreements (five agreements for works and one Corporate Guarantee) and each agreement contains a provision for arbitration. Hence, *there has to be an Arbitral Tribunal for the disputes pertaining to each agreement. While the arbitrators can be*

[2] (2018) 2 SCC 534

> *the same, there has to be six Tribunals* — two for international commercial arbitration involving the Spanish Company M/s Duro Felguera, S.A. and four for the domestic."
>
> (Emphasis supplied)

25. The only exception to separate arbitral proceedings covering separate agreements, is where the parties agreed to a consolidated proceeding. In the present case, quite obviously, there is no such agreement.

26. Despite being repeatedly queried in that regard, Mr. Singh is unable to dispute the empirical proposition in law, that, in absence of any agreement between the parties to the contrary, consolidated arbitral proceedings are not permissible, in view of ***Duro Felguera***[1] . He, however, relies on the communication dated 13th April, 2021, from the petitioner to the respondent as amounting to assent, by the petitioner, to consolidation of the disputes arising out of the Concession Agreements for arbitration. He also points out that a consolidated RFP had been issued by the Petitioner in the first instance.

27. I am unable to agree with him.

28. The letter dated 13th April, 2021 from the petitioner to the respondent, in reply to the respondent's notice invoking the arbitration, does not expressly or by necessary implication agree to a consolidated arbitration covering all the agreements. The fact that the RFP initially issued, covered the work under all the agreements can

also be of no avail to the respondent as the RFP; for two reasons; firstly, because it was issued before the Concession Agreements were executed and, secondly, because the RFP was a consolidated RFP covering all the work required to be done, and was no indicator of whether there would, therefore, be executed one Concession Agreement or more. Once separate Concession Agreements came to be executed for the maintenance of bus queue shelters for different Zones, these separate Concession Agreements would govern the arbitral proceedings and procedure.

29. Applying ***Duro Felguera***[1], therefore, it is clear that the three Concession Agreements had to constitute subject matter of three different arbitral proceedings, though they could be decided by one Arbitral Tribunal.

30. The preliminary objection regarding maintainability, as advanced by Mr. Singh, is also, in my view, completely bereft of substance. The judgment in ***IFFCO***[2], to which Mr. Andlay alludes, covers the issue. In ***IFFCO***[2], the Supreme Court has clearly held that an order by an Arbitral Tribunal, which decides an issue finally at the interlocutory stage would be entitled to be regarded as an "interim award", for the purposes of Section 34 of the 1996 Act. Mr. Andlay is correct in his submission that there was no going back on the decision of the learned Arbitral Tribunal, in the impugned order, rejecting the petitioner's request for separate arbitral proceedings. Once the learned Arbitral Tribunal had decided that the proceedings would be consolidated, they would proceed in a consolidated fashion till

completion. This decision was, therefore, on the issue of consolidation of proceedings, final till the completion of arbitral proceedings, and, therefore, in my view, is eligible to be regarded as an 'interim award', amenable to challenge under Section 34 of the 1996 Act.

31. On merits, the view taken by the learned Arbitral Tribunal, being directly contrary to the judgment of the Supreme Court in ***Duro Felguera***[1], cannot sustain.

32. Accordingly, the impugned order of the learned Arbitral Tribunal is quashed and set aside.

33. It would be open to the respondent to file separate Statement of Claims in respect of its claims in each agreement which, if and when filed, would be decided by the learned Arbitral Tribunal in accordance with law. This Court does not express any opinion on the maintainability or merits of such separate Statements of Claims, as and when filed.

34. If and when the separate Statement of Claims are filed, it shall be open to the learned Arbitral Tribunal, presently in *seisin* of the disputes, to entertain and decide such separate Statements of Claims treating them as separate arbitral disputes.

35. The decision, in the impugned order, to consolidate the disputes in one Statement of Claim and decide the disputes as one proceeding, cannot sustain and is accordingly set aside.

36. The petition stands allowed in the aforesaid terms, with no orders as to costs.

37. Pending applications, if any, stand disposed of.

C.HARI SHANKAR, J

DECEMBER 7, 2021
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