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REPORTABLE

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION APPLICATION (L) NO. 2573 OF 2020**

**PIONEER PUBLICITY CORPORATION
PVT LTD,**

A company registered under the Companies Act 1956 and thus deemed to be registered under the Companies Act 2013, having its registered office at: Pioneer House, Plot No.6, Block No.02C, Near Rohtak Road, WEA, Karol Bagh New Delhi- 110 005 And having its Corporate office at: Office No. 410 - 416, "B" Wing, Anjani Complex, Periera Hill Road, Opp. Gurunanak Petrol Pump, Off. Andheri-Kurla Road, Andheri (E), Mumbai-400 099

... Applicant**~ VERSUS ~**

- 1. AIRPORT AUTHORITY OF INDIA,**
Western Region Headquarters having its office at: The office of the Regional Executive Director (W.R.), Opp. Parsi-wada, Sahar Road, Vile Parle (E), Mumbai - 400 099
- 2. UNION OF INDIA,**
Having its Legal Cell at: Aayakar Bhavan, Marine Lines, Mumbai 400 020

... Respondents

APPEARANCES

FOR THE APPLICANT, **Mr Dineshkumar Seth, i/b Mehul Rathod**
“PIONEER”

FOR THE 1ST **Mr Ajay Khaire**
RESPONDENT “AAI”

FOR THE 2ND **Ms Shilpa Kapil**
RESPONDENT,
UNION OF INDIA

CORAM: GS PATEL, J
By Video Conferencing)

DATED: 29th September 2020

ORAL JUDGMENT:-

1. Heard through video conferencing.
2. This is an application under Section 11 of the Arbitration and Conciliation Act 1996. The 1st Respondent is the Airport Authority of India (“AAI”) and is joined through its Western Region Headquarters in Mumbai. The 2nd Respondent is the Union of India.
3. The Applicant (“Pioneer”) was the successful tenderer for AAI’s September 2017 e-tender inviting bids for the display of 8,000 sq ft advertising hoardings at the New Airport Colony along the Western Express Highway in Mumbai. A photocopy of e-tender

document is annexed. By its letter dated 28th March 2018, AAI selected Pioneer as the successful bidder for a term of three years at a monthly licence fee of Rs. 16.40 lakhs with an escalation clause of 10%.

4. Pioneer paid the necessary security deposit towards electricity charges and then made an advance payment of Rs. 17,71,200/- as the licence fee for the first month. Pioneer then sent to AAI a bank guarantee dated 3rd April 2018 in the amount of Rs. 79,37,600/- towards a security deposit. This amount was computed exactly as stipulated in the e-tender read with award letter of 28th March 2018. The bank guarantee was towards the security deposit.

5. Pioneer claims that it then proceeded to apply for the necessary permissions from various authorities. There was some delay, and changes in the permissible height of the display hoardings. I am not concerned with these factual aspects in a Section 11 application. They lie in the remit of an arbitration.

6. What is, however, of relevance is that by its letter dated 10th January 2019 AAI amended the terms of the contract and reduced the hoarding size from 8,000 sq ft to 5,000 sq ft. All other terms and conditions were kept intact.

7. Pioneer then began applying once again with various departments for the necessary permissions. These included the Mumbai Metropolitan Regional Development Authority (“MMRDA”) and the Public Works Department (“PWD”). In this

time, there was some local jurisdictional wrangle as to the Western Express Highway and which authority would have jurisdiction over it. The result, it seems, was that Pioneer was being shunted from one authority to the other, continually making fresh applications. There then followed a Government of Maharashtra Notification on 19th March 2019 saying that the jurisdiction over the Western Express Highway had been removed from the PWD and now stood vested with the MMRDA. This drove the Pioneer to once again applying to the MMRDA for permission. But Pioneer's woes had still not ended. For there then intervened the Parliamentary Elections in April-May 2019 with all the attendant restrictions that elections usually entail.

8. It seems that it was not until late June 2019 that Pioneer received a response from MMRDA.

9. The present Application notes this in some detail to attempt an explanation of the delays that undoubtedly occurred. On 9th April 2019 and 27th June 2019, Pioneer wrote to AAI saying there had been these delays in obtaining permissions. Pioneer requested that the contract be allowed to start from the day of installation of the contract hoardings. AAI rejected this request by its letter dated 8th May 2019.

10. The contract itself only allowed for a 60-day 'gestation' period. That period ended on 11th March 2019. What the gestation period provision meant was that after the gestation period Pioneer was liable to pay AAI a monthly licence fee. AAI then began raising monthly bills commencing from 29th March 2019 on Pioneer. There appear to

be five such bills or invoices from AAI between 29th March 2019 and 4th July 2019.

11. On 1st July 2019, AAI gave Pioneer a 30-day notice of termination of the contract.

12. Pioneer invoked arbitration in terms of Clause 20, which says:

20. All disputes and differences arising out of or in any way touching or concerning this Agreement (except those ...), shall, in the first instance, be referred to a Dispute Resolution Committee (DRC) set up at the airport for which a Written application should be obtained from the party and the points clearly spelt out. In case the dispute is not resolved within 45 days of the reference, then the case shall be referred to the Sole Arbitration of a person to be appointed by the Chairman / Member of the Authority. The award of the Arbitrator so appointed shall be final and binding on the parties. The Arbitration and Conciliation Act 1996 shall be applicable. ... The case shall be referred to the Sole Arbitrator by the Chairman / Member of the Authority, subject to the condition that the Licensee shall have to deposit the disputed amount with AAI as condition precedent before making reference to the Arbitration for adjudication of dispute. ...

There is no dispute that jurisdiction is with courts in the towns where the airport in question is situated. In this case, the jurisdiction would therefore be Mumbai.

13. As Clause 20 indicates, disputes must first pass through the Dispute Resolution Committee (“DRC”).

14. Mr Seth points out from the exhibits to the Petition that the Petitioners made not one but two such representations to the DRC. The first of these is of 12th July 2019.¹ AAI rejected this by its letter dated 22nd July 2019.² The reason for rejection is both interesting and relevant in the context of the opposition to this Section 11 Application.

15. The rejection letter from AAI of 22nd July 2019 refers to the very same Clause 20 of the general terms and conditions of the contract, i.e. the arbitration clause, and demands payment of an amount of Rs. 56,84,650/- and a consent letter to accept the recommendations of the DRC. The letter clearly states that compliance with these two requisitions was required and, once received, the request for a reference to DRC 'would be considered'. It seems that Pioneer did make that payment and, by its later letter dated 3rd September 2019,³ presented an application under Clause 20, setting out some of the terms and the background facts. The request was for a resolution of the disputes by the DRC.

16. AAI rejected this second application too by its letter of 23rd September 2019.⁴ Again, and for the same reasons, this letter is important. The letter is partly in Hindi and partly in English. In paragraph 1, AAI again referred to Clause 20 of the general terms and conditions of the contract. It then said that 'the contract' had been terminated for non-submission of the requisite NOC from the

1 Exhibit 'P', Vol 04, printed page 79, PDF page 56.

2 Exhibit 'Q', Vol 04, printed page 81, PDF page 57.

3 Exhibit 'V', Vol 04, printed page 139, PDF page 115.

4 Exhibit 'W', Vol 04, printed page 142, PDF page 118.

statutory authorities. It then went on to say that this Court had disposed of an earlier Arbitration Petition (under Section 9) filed by Pioneer. For these reasons, the DRC had concluded that there was no substance in Pioneer's reference.

17. What is of relevance in both AAI's letters referred to above is that at no time did AAI dispute the *existence* of the contract or the arbitration agreement. To the contrary: AAI itself expressly referred to and invoked the arbitration clause; and that arbitration clause is to be found in, and only in, the contract. AAI demanded payment of an advance amount — again, under the arbitration clause. In the second letter, it specifically mentioned that the contract had been 'terminated for non-submission of the requisite NOC', i.e. that there was non-compliance with a *contractual* requirement.

18. In this context, a reference to the actual termination letter dated 1st July 2019 is instructive.⁵ This one-page letter does not say that there was no contract at all. It specifically alleges non-compliance by Pioneer of *contractual* terms and conditions. Further, it quotes extensively from the contract in question. The letter refers to the contract, the award letter of 28th March 2018, the revised award letter of 10th January 2019 and describes in more than one place the document as '*the subject contract*'. The allegation in the very first paragraph is that Pioneer failed to submit the NOC as per the 'NID provisions'. This is a reference to the contract in question and nothing else. In the second paragraph, there is a specific invocation of paragraph 1(b) of the licence agreement citing termination for

5 Exhibit 'O', Vol 04, printed page 78, PDF page 55.

unsatisfactory performance. In the third paragraph, AAI proceeds— and these are its own words—

‘to terminate the subject contract, i.e. Advertising Hoarding Contract at New Airport Colony’.

19. I have noted this at some length because the response on instructions from Mr Khaire, to my very great surprise, is that *there is no contract at all*. When pressed for an explanation of what this is supposed to mean, he states that his instructions are to submit that there is no document ‘that has been signed by the parties on the necessary stamp paper; therefore there was no contract, and therefore there is no arbitration agreement’. It is his submission that an *actual physical signature* on the document is required for a contract to come into existence and that without such a signed document, there can be no contract and no arbitration agreement.

20. Whatever may be Mr Khaire’s instructions, that argument is neither the law nor is it in facts. It may well be self-defeating. If there was no contract, AAI could not have raised invoices. It could not have demanded a bank guarantee, security deposit or any other amount. What did AAI terminate if not the contract? Why did it demand amounts under the contract? If there was no contract, how could it complain of ‘non-compliance’ of anything except the terms of the very contract? There are, besides, the two rejections by the DRC of Pioneer’s reference to dispute resolution. These rejections are also specifically anchored to contractual provisions.

21. As to the law on the subject, I believe this is reasonably well settled and admits of a very little dispute.

22. Mr Khaire's reliance on the decision on *PSA Mumbai Investments Pte Ltd v Board of Trustees of JNPT*⁶ is wholly misplaced. That was a case where JNPT issued a Request for Qualification or RFQ. That was a two-stage process: eligibility, to be followed by an RFP or a Request for Proposal. The appellant's consortium qualified and succeeded in the RFP, obtaining a letter of award. JNPT called on the consortium to perform its part of the *bid*. That not having been done, JNPT withdrew the award. It claimed damages and invoked arbitration. It was the appellant who resisted arbitration. The court held that there was no absolute and unqualified acceptance by JNPT of the bid by its letter of award. There was, therefore, no enforceable contract. The matter, therefore, stood at the acceptance stage of the bid itself. Those facts could not be further from the facts in this case. Here, it is not AAI invoking arbitration. It is AAI that acted on its letter of award. Indeed, it amended it and issued an amended letter. It demanded performance, including a bank guarantee. It raised invoices. It complained of non-performance of the contract, and it demanded a deposit before the complaint could be taken to the DRC. It then terminated the contract itself. *PSA Mumbai* has no application at all in a situation like this.

23. Far more apposite are the decisions Mr Seth cites. First, *Caravel Shipping Services Pvt Ltd v Premier Sea Foods Exim Pvt Ltd*,⁷

6 (2018) 10 SCC 525.

7 (2019) 11 SCC 461.

which clearly says the signing of an arbitration agreement is not mandatory when the agreement satisfies the test of being in writing. Second, there is the Supreme Court decision in *Unissi (India) Pvt Ltd v Post Graduate Institute of Medical Education & Research*,⁸ which dealt with precisely the question of the need to execute a ‘formal arbitration agreement’ in the context of an open tender. Finding that the tender document itself had an arbitration clause (as in the present case) and that the appellants’ tender was accepted and the contract awarded (as in this case), the Supreme Court held that a valid arbitration agreement had come into existence even without a formally signed document. Indeed, in paragraph 15, the Supreme Court noted that in the respondent’s letter, there was ‘a reference to the aforementioned tender enquiry number’. The present case is on even surer ground, for, as I have noted, AAI acted extensively and repeatedly on the contract — invoking it, citing it, making demands under it, raising invoices under it, complaining of its non-performance and finally terminating it. The conduct of the parties is enough to bring this case on parity with *Unissi*, especially given the further observations in paragraph 17 of that decision.

24. Finally, Mr Seth places the 2009 decision of the Supreme Court in *MR Engineers & Contractors Pvt Ltd v Som Datt Builders Ltd*.⁹ While this is principally on the question of incorporation by reference of an arbitration agreement in another contract, the underlying

8 (2009) 1 SCC 107.

9 (2009) 7 SCC 696. Specifically referenced in *Caravel Shipping*, 2019, paragraph 9, SCC p. 464.

principle is the same: once there is a written agreement and parties have acted on it, that is sufficient.

25. As a general principle, I would venture to add this: the trend in the last few years has been to affirm and re-affirm the existence of arbitration agreements and to hold parties to the bargain they struck. *PSA Mumbai* strikes no discordant note as Mr Khaire faintly attempts to suggest. To the contrary: it found that no concluded contract had been reached because there was not an unconditional acceptance of the offer. It did not hold that there was no valid contract only for want of signature on a formal document.

26. Inevitably, I must return the finding that there is no substance at all in AAI's opposition. There was and is a valid arbitration agreement contained in Clause 20 set out above. There is simply no substance to the argument by AAI that there 'exists no contract and no arbitration clause'.

27. The arbitration clause itself requires reference to a sole Arbitrator to be appointed by the Chairman/Member of AAI. A unilateral appointment of that kind, even if Mr Seth for the Applicant is agreeable, would be in the teeth of the settled law of this Court in view of *Perkins Eastman Architect DPC & Anr vs HSSC (India) Ltd*;¹⁰ *Voestalpine Schienen GmbH v Delhi Metro Rail Corporation Ltd*;¹¹ and *TRF Limited v Energo Engineering Products Ltd*.¹² I considered all these

10 2019 (9) SCC OnLine SC 1517.

11 (2019) 4 SCC 665.

12 (2017) 8 SCC 377.

in *Lite Bite Foods Pvt Ltd v AAI*.¹³ This leads to the conclusion that there are in the current state of the law only two modes of appointment of an arbitral tribunal. One is by consent of the parties, and the other is an appointment by the Court. Clearly, in the present case, the first is not possible.

28. It remains, therefore, for me to appoint an Arbitrator. Accordingly, I nominate Mr Mayur Khandeparkar, learned Advocate of this Court as the Arbitrator before whom all disputes and differences arising from the contract comprised in e-tender document AAI/RHQ/WR/COMML/04/2017 read with the award letter dated 28th March 2018 and the amendment letter dated 10th January 2019 from AAI (itself to be read with Pioneer's response letter also of 10th January 2019 accepting the revised letter issued by AAI).

29. The appointment is on the usual terms and conditions set out at the end of this order.

30. Ms Kapil is correct in saying that the Union of India has been needlessly joined to the Section 11 Application. It is not a necessary party. Mr Seth on instructions agrees to delete the name of the 2nd Respondent. Leave to amend. Amendment to be carried out in hard copy without need of re-verification within three weeks from today.

31. I dispose of the Arbitration Application in these terms with no order as to costs.

13 2019 SCC OnLine Bom 5163.

32. The Private Secretary of this Court will digitally sign this order. All concerned will act on production by fax or email of a digitally signed copy of this order.

TERMS OF REFERENCE

(a) **Appointment of Arbitrator:** By consent, Mr Mayur Khandeparkar, learned Advocate, is hereby nominated to act as a Sole Arbitrator to decide the disputes and differences between the parties arising from the contract comprised in e-tender document AAI/RHQ/WR/COMML/04/2017 read with the award letter dated 28th March 2018 and the amendment letter dated 10th January 2019 from AAI (itself to be read with Pioneer's response letter also of 10th January 2019 accepting the revised letter issued by AAI).

(b) **Communication to Arbitrator of this order:**

(i) A copy of this order will be communicated to the learned Sole Arbitrator by the Advocates for the Applicant within one week from the date this order is uploaded.

(ii) In addition, within one week of this order being uploaded, the Registry will forward an ordinary copy of this order to the learned Sole Arbitrator at the following postal and email addresses:

Arbitrator **Mr Mayur Khandeparkar, Advocate.**

Address 102, Oval House
British Hotel Lane, Fort

Mumbai 400 001

Mobile +91 98192 67999

Email khandeparkar_mayur@yahoo.com

- (c) **Disclosure:** The learned Sole Arbitrator is requested to forward the necessary statement of disclosure under Section 11(8) read with Section 12(1) of the Arbitration Act to the Prothonotary and Senior Master of this Court, referencing this arbitration application, as soon as possible, and in any case sufficiently before entering upon the reference to arbitration. That statement will be retained by the Prothonotary & Senior Master on the file of this application. Copies will be given to both sides.
- (d) **Appearance before the Arbitrator:** Parties will appear before the learned Sole Arbitrator on such date, and at such place as the learned Sole Arbitrator nominates to obtain appropriate directions regarding fixing a schedule for completing pleadings, etc.
- (e) **Contact/communication information of the parties:** Contact and communication particulars are to be provided by both sides to the learned Sole Arbitrator within one week of this order being uploaded. The information is to include a valid and functional email address.
- (f) **Section 16 application:** The respondent is at liberty to raise all questions of jurisdiction within the meaning of section 16 of the Arbitration Act. All contentions are left open.

- (g) Interim Application/s:**
- (i) Liberty to the parties to make an interim application or interim applications including (but not limited to) interim applications under Section 17 of the Arbitration & Conciliation Act, 1996 before the learned Sole Arbitrator. Any such application will be decided in such manner, and within such time as the learned Sole Arbitrator deems fit.
 - (ii) The learned Sole Arbitrator is requested to dispose of all interim applications at the earliest.
- (h) Fees:** The arbitral tribunal's fees shall be governed by the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018.
- (i) Sharing of costs and fees:** Parties agree that the two sides will bear all arbitral costs and the fees of the arbitrator in equal shares in the first instance.
- (j) Consent to an extension if thought necessary.** Parties immediately consent to a further extension of up to six months to complete the arbitration should the learned Sole Arbitrator find it necessary.
- (k) Venue and seat of arbitration:** Parties agree that the venue and seat of the arbitration will be in Mumbai.

(G. S. PATEL, J)