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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Arb.P.No. 208/2009

December 15, 2009.

M/S STUP CONSULTANTS PVT. LTD.

...Petitioner

Through: Mr. D. Moitra, and Mr. P. Roy
Chaudhuri Advocates

VERSUS

M/S INDIAN OIL CORPORATION LTD.

....Respondent

Through: Mr. V.N.Kaura, Advocate with
Ms. Paramjeet Benipal,
Advocate

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

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JUDGMENT(ORAL)

VALMIKI J. MEHTA, J.

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1. This is a petition under Section 11 of the Arbitration and Conciliation Act, 1996 whereby the petitioner seeks reference of the disputes between it and the respondents to arbitration. The disputes pertain to the Letter of

Intent dated 11.12.2000 and the Letter of Acceptance dated 23.3.2001 issued by the respondent in favour of the petitioner in respect of a contract whereby the petitioner was to give to the respondent certain consultancy services for architectural/design engineering, interior decoration/horticulture/landscaping, project management work etc. The contract in question contains an Arbitration Clause 15 whereunder the disputes are to be referred to arbitration of a sole Arbitrator to be agreed upon between the parties.

2. It is not disputed that a contract was entered into between the parties and it is not further disputed that the contract contains an arbitration clause. It is further also not in dispute that differences have arisen between the parties under the subject agreement.

3. Mr. Kaura, counsel for the respondent has however argued against reference of the disputes on the ground that the relevant part of Clause 15.1 of the contract in question requires that only a notified claim can be referred to arbitration and the disputes do not pertain to a notified claim and consequently the right to seek reference of the disputes to arbitration stands extinguished. The relevant portion of Clause 15.1 is reproduced as below:-

“15.1 Any dispute or difference between the parties hereto arising out of any notified claim of the CONSULTANT hereof and/or arising out of any amount claimed by the OWNER (whether

or not the amount claimed by the OWNER or any part thereof shall have been deducted from the Final Bill of the CONSULTANT or any amount paid by the OWNER to the CONSULTANT in respect of the work) shall be referred to arbitration in accordance with the UNICITRAL Rules as adopted in India by the Arbitration and Conciliation Act, 1996.”

It has additionally been argued by Mr. Kaura that claims which are preferred by the petitioner are barred by time.

4. A reading of the aforesaid Clause 15.1 of the Conditions of Contract shows that seemingly only a notified claim can be referred to Arbitration. On a query by the Court to the counsel for the respondent as to whether the expression “notified claim” is defined in the contract, the counsel for the respondent admits that there is no definition of the expression “notified claim” in the contract. Therefore, I would have to look at the normal meaning of the expression “notified claim”. In the opinion of this court, “notified claim” would simply mean a claim which is notified by the petitioner to the respondent. Taking such meaning, I may at this stage, refer to the letter dated 7.2.2007 written by the petitioner to the respondent, and as brought to my notice by the counsel for the petitioner. Para 2 of this letter shows that the claims which are sought to be referred to Arbitration were duly notified to the respondent. The counsel for the petitioner has also brought to my attention the reply given to this letter on behalf of the

respondent through its Advocates on 13.11.2007, and in which reply there is no denial of the averment with regard to the notification of the claims to the respondent as stated in the letter of the petitioner dated 7.2.2007. The counsel for the petitioner has further brought to my notice the last para of the reply dated 13.11.2007, in which the respondent itself has proposed the names of the Arbitrators to whom the disputes can be referred to.

5. On the facts itself as stated in para 4 above, therefore, it is quite clear that there is no bar in terms of Clause 15.1 to hold that the right of a claimant to seek reference of the disputes to Arbitration is extinguished in as much it is quite clear that the claimant had very much notified the claims and the fact that such claims were notified was not disputed by the respondent.

6. In my opinion, in fact, that part of Clause 15.1 of the Contract, as reproduced above is wholly illegal and void if it is read as extinguishing the right to seek arbitration. This conclusion follows from a reading of Section 28 of the Contract Act, 1872 and which Section was amended in 1997 for this very purpose to declare such clauses as void. Section 28 of the Contract Act, after amendment by Act-1 of 1997, reads as under:-

“28. Agreement in restraint of legal proceedings, void-

- (a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or
- (b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.”

Section 28 was amended by adding sub-section (b) thereto and as per which any clause in a contract which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.

7. A learned Single Judge of this Court, Hon’ble Mr. Justice Sanjay Kishan Kaul, in the judgment reported as ***Pandit Construction Company vs DDA 2007 (143) DLT 270*** has held that any such clause in a contract which extinguishes the rights of the parties on the expiry of a period would be considered as void. The learned Single Judge has referred to the earlier judgments on this aspect and has also gone into the aspect of amendment to Section 28 while also referring to the Supreme Court judgment prior to the amendment and has distinguished them.

8. No doubt the relevant part of Clause 15.1 does not contain a time period, however, when no time period is specified for doing of an act under

the contract, then, the time requirement will be a reasonable period of time vide Section 46 of the Contract Act. Thus a conjoint reading of Clause 15.1 and Section 46 would mean that if the claims are not notified in a reasonable period, the rights thereto get extinguished and which is exactly what Section 28 of the Contract Act prohibits.

9. When this judgment was being dictated in open Court after the counsel for the parties were heard, and when I came to the stage of dictating the aforesaid portion under Section 28 of the Contract Act, Mr. Kaura argued that the judgment should not be passed by making a reference to Section 28 as that issue was not argued. I do not think it is fair on the part of the counsel for the respondent to urge that the court cannot independently rely upon any Section or any judgment if it is of the opinion that such a Section or that judgment applies. A court is bound, not by the limited submissions of the counsel, but by the law of the land. I would only state that the prerogative of the counsel comes to an end when the arguments are concluded. I could have as well reserved the judgment and thereafter while dictating the judgment relied upon Section 28 of the Contract Act and the judgment in the case *of Pandit Construction Company(supra)* but, I have chosen to dictate the judgment in the open court, but, this however, cannot

mean that the counsel can in the middle of the dictation of the judgment seek to interfere with the court proceedings and say that the judgment should not be passed. Accordingly, I reject the contention as raised by Mr. Kaura on behalf of the respondent.

10. So far as the issue that the claims are within limitation or barred by limitation, this is an issue of merits as held by the Supreme Court in the judgment reported as *National Thermal Power Corporation Ltd. Vs. Siemens, 2007(4) SCC 451*. In fact, a decision on the issue of limitation has been held in this judgment to be an interim award under the provisions of the Arbitration and Conciliation Act, 1996 entitling the party to file an objection to the same under Section 34 thereof. Accordingly, this issue of limitation I feel would be decided by the Arbitrator in the arbitration proceedings and not by this court while appointing an arbitrator under Section 11 of the Arbitration and Conciliation Act.

11. Accordingly, I am of the opinion that this petition deserves to be allowed. At this stage of referring the disputes to the Arbitration, I put it to the counsel for the parties that whether they are agreeable to refer the disputes to the Arbitration Centre of the Delhi High Court and be bound by the rules thereof. To this position the counsel for the petitioner had no

objection but the counsel for the respondent states that since the judgment is not acceptable to the respondent, the respondent would not agree to the Arbitration of the Delhi High Court Arbitration Centre.

12. The petition under Section 11 is accordingly allowed and I appoint Justice Arun Kumar, (Retired), 9, Tyag Raj Marg, New Delhi-110011, 9810398777, 26510146, (who is on the panel/list of Arbitrators of the Delhi High Court Arbitration Centre) as an Arbitrator to decide disputes/claims/counter-claims/differences in any manner connected with or arising out of the subject contract between the parties whereby consultancy services were provided by the petitioner to the respondent. I may state that the fees of the Arbitrator will be the same as per the schedule of fees as given under the rules of the Delhi High Court Arbitration Centre. The Arbitrator as far as possible should decide the matter before him within a period of one year from the date of his entering upon the reference. The petitioner shall file its statement of claim before the Arbitrator within a period of six weeks from today. The respondent shall file the written statement and counter claim if any, within another period of four weeks thereafter. Replication and written statement to the counter-claim will be filed within another period of four weeks thereafter. Parties to appear before

the Arbitrator on 26th March, 2010 at 5.00 PM. A copy of this judgment be sent to the Arbitrator.

13 With the aforesaid observations, the present petition is disposed of as allowed with costs quantified at Rs.50,000/-.

DECEMBER 15, 2009

VALMIKI J. MEHTA, J.

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