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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**+ **ARB.P. 2/2015****M/S WEST END MOTORS**

..... Petitioner

Through **Mr.Manuj Aggarwal, Adv.**

versus

DELHI METRO RAIL CORPORATION LTD

..... Respondent

Through **Mr.R.V. Sinha, Adv. with Mr.Sanjay
Kumar, LO DMRC, in person.****CORAM:****HON'BLE MR. JUSTICE MANMOHAN SINGH****ORDER**

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04.04.2016

1. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator.
2. Learned counsel for the respondent does not dispute that certain works were done by the petitioner. There is an arbitration clause existing in the agreement and before filing of the present petition, the petitioner also invoked the arbitration. It is a matter of fact that in 2010 also the petitioner tried to invoke the arbitration. However, the same could not be materialised due to further correspondences exchanged between the parties. The facts and circumstances of the case are mentioned in the petition pertaining to the delay. The correspondences were exchanged between the parties up to January, 2012. As the respondent was not agreeable to accept the claims of the petitioner, it is left with no option but to invoke the arbitration in 2014.
3. As per the petitioner, its claim is about Rs.60 lacs.
4. The main objection of the respondent for appointment of an Arbitrator

is that claim is time barred as no response was received from the petitioner w.e.f. 3rd January, 2011 as the petitioner has failed to submit the detail drawings and specifications for the modification of the ramp proposed for modification and got the same approved from MCD. The petitioner vide letter dated 29th December, 2010 finally decided to file a case against the respondent.

5. The petitioner itself has admitted that vide letter dated 9th April, 2010 the petitioner invoked the arbitration clause for appointment of the Arbitrator. Thus, it is apparent that the cause of action had arisen in April, 2010 when the petitioner as per its own admission issued the letter dated 9th April, 2010 invoking the clause seeking resolution of dispute for arbitration. It is further submitted that in view of the facts and submissions made above as well as in the brief facts of the case no arbitrable dispute survives in the matter as now there is no live claim and the claim is barred by time.

6. I have heard the learned counsel for both the parties. After hearing and having gone through the correspondence exchanged between the parties from the year 2010 to 2012, I am of the view that there is a live dispute existing between the parties. The claims raised by the petitioner are *prima facie* not dead claim. The objection of the respondent on limitation can be decided by the Arbitral Tribunal. Unless it is clear that there is no live claim(s) normally the issue of limitation is a mixed question of law and facts. The claims in the present case are not ex-facie time barred. Therefore references of the claims are necessary to be adjudicated by the Arbitral Tribunal.

7. The prayer made in the present petition is even otherwise liable to be allowed in view of the decision given by the Supreme Court in the case of

Schlumberger Asia Service Ltd. v. Oil and Natural Gas Corporation Ltd., AIR 2013 SC 3778. Para 25 of the said judgment reads as under:

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“14. To find out whether a claim is barred by res judicata, or whether a claim is ‘mala fide’, it will be necessary to examine the facts and relevant documents. What is to be decided in an application under Section 11 of the Act is whether there is an arbitration agreement between the parties. The Chief Justice or his designate is not expected to go into the merits of the claim or examine the tenability of the claim, in an application under Section 11 of the Act. *The Chief Justice or his designate may however choose to decide whether the claim is a dead (long-barred) claim* or whether the parties have, by recording satisfaction, exhausted all rights, obligations and remedies under the contract, so that neither the contract nor the arbitration agreement survived. *When it is said that the Chief Justice or his designate may choose to decide whether the claim is a dead claim, it is implied that he will do so only when the claim is evidently and patently a long time-barred claim and there is no need for any detailed consideration of evidence.* We may elucidate by an illustration: if the contractor makes a claim a decade or so after completion of the work without referring to any acknowledgment of a liability or other factors that kept the claim alive in law, and the claim is patently long time-barred, the Chief Justice or his designate will examine whether the claim is a dead claim (that is, a long time-barred claim). On the other hand, if the contractor makes a claim for payment, beyond three years of completing of the work but say within five years of completion of work, and alleges that the final bill was drawn up and payments were made within three years before the claim, the Court will not enter into a disputed question whether the claim was barred by limitation or not. The Court will leave the matter to the decision of the Tribunal. If the distinction between apparent and obvious dead claims, and claims involving disputed issues of limitation is not kept in view, the Chief Justice or his designate will end up deciding the

question of limitation in all applications under Section 11 of the Act.”
(emphasis supplied)

These observations make it clear that it is optional for the Chief Justice or his designate to decide whether the claim is dead (long-barred). It is also made clear by this Court that the Chief Justice or his designate would do so only when the claim is evidently and patently a long time-barred claim. The claim could be said to be patently long time-barred, if the contractor makes it a decade or so after completion of the work without referring to any acknowledgment of a liability or other factors that kept the claim alive in law. On the other hand, if the contractor makes a claim, which is slightly beyond the period of three years of completing the work say within five years of completion, the Court will not enter into the disputed questions of fact as to whether the claim was barred by limitation or not. The judgment further makes it clear that there is no need for any detailed consideration of evidence.”

8. The liberty is granted to the respondent to raise the issue of limitation before the learned Arbitrator at any stage. Ms. Aditi Sharma, Advocate, Mob. No.9899674082, who is present in Court, is appointed as sole Arbitrator to adjudicate the disputes between the parties as mentioned in the present petition. The parties are also allowed to file their respective claims and counter-claims before the Arbitrator. The parties to appear before the Arbitrator on 7th July, 2016 in Delhi High Court Bar Room No.18.

9. The arbitration proceedings shall take place in the High Court premises itself. The Arbitrator shall ensure the compliance of the provisions of Arbitration and Conciliation (Amendment) Act, 2015 before commencing the arbitration. The fees of the learned Arbitrator is fixed at Rs.1,00,000 /- which shall be shared by both the parties in equal proportions.

10. The petition is accordingly disposed of.

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11. Copy of this order be given *dasti* to the learned counsel for the parties and a copy thereof be delivered to the learned Arbitrator forthwith.


MANMOHAN SINGH, J.

APRIL 04, 2016/jk