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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ARB.P. 76/2016

SHANTI PRAKASH GOENKA

..... Petitioner

Through : Mr R Rajappan & Ms Rajni, Advs

versus

MAHANAGAR TELEPHONE NIGAM LTD.

..... Respondent

Through : Ms Suruchi Suri, Adv

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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20.09.2016

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 11 (5) of the Arbitration and Conciliation Act, 1996 (hereafter the 'Act') *inter alia*, praying that an arbitrator be appointed for adjudication of the disputes that have arisen between the parties.

2. It is not in dispute that the petitioner and the respondent had entered into an agreement dated 25.10.2010 for construction of MTNL staff quarters at GH-17, Paschim Vihar, New Delhi. It is also not in dispute that the said contract includes an arbitration clause which reads as under:-

“53. ARBITRATION SETTLEMENT OF DISPUTES

53.1 For contract other than with public sector undertakings

Except where otherwise expressly provided in the

contract all questions differences & disputes relating to the meaning of the specification, designs, drawing and instructions herein before mentioned and as the quality of workmanship or material used on the work or as to any other questions, claim, right, matter or things whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates instructions, orders or these conditions or others concerning the works or the executions or failure to execute the same whether arising during the progress of the work or after the completion, cancellation, termination or abandonment thereof shall be referred to the sole arbitration of the person to be appointed by the CE(BW), MTNL, Delhi (in charge of work) at the time of dispute or if there is no chief engineer, the administrative head of the said MTNL, Delhi at the time of such appointment. There will be no objection to any such appointment that the arbitrator so appointed is a government / MTNL servant, that he had to deal with the matter to which the contract relates and that in the course of his duties as dispute or difference. The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reasons, CE(BW) of MTNL as aforesaid at the time of such transfer, vacation of office or inability to act, shall appoint another person to act as arbitrator In accordance with the term of the contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than a person appointed CE (BW) of the MTNL as aforesaid should act as arbitrator and if for any reason that's not possible, the matter is not to be referred to arbitration at all. In all cases where the amount of claim is Rs. 75000/- (Rupees Seventy five thousand only) and above, the arbitration shall give reason for the award.

Subject as foresaid the provisions of the arbitration & conciliation act, 1996 or any statutory modification or re-enactment there of the rules made here under and for the time being in force shall apply to the arbitration proceeding under his clause.

It is a term of the contract that the party invoking arbitration shall specify the dispute or disputes to be referred to arbitrator under this clause together with the amount or amounts claimed in respect of each dispute.

If the any contractor(s) does/ do not make any demand for arbitration in respect of any claim (s) in writing within 90 days of receiving the intimation from the MTNL, that the bill is ready for payment, the claim of the contractor (s) will be demand to have been waived and absolutely barred and the MTNL shall be discharged and released of all liabilities under the contract in respect of these claims.

The decision of superintending engineer regarding the quantum of reduction as well as justification thereof in respects of rates for sub-standard work which he may decide to be accepted will be final and would not be open to arbitration.”

3. The only objection raised by the respondent is that the invocation of the arbitration clause is beyond the period of limitation of 90 days. The learned counsel for the respondent has pointed out that the final bill was prepared on 15.03.2013 and the petitioner invoked the arbitration clause on 04.04.2015. She also drew the attention of the Court to the arbitration clause, which specifically

provides that if the demand for arbitration in respect of any claim is not made within 90 days of receiving the intimation from the MTNL that the bill is ready for payment, the demand would be deemed [*sic* demand] to have been waived and barred.

4. She also submits that in view of express condition in the arbitration clause, the petitioner is deemed to have waived his right for invoking the arbitration.

5. The learned counsel for the petitioner has countered the aforesaid submissions and submits that the issue whether the period of limitation for invoking the arbitration clause can be restricted is no longer *res-integra* as same is covered by several decisions of this Court including **Hindustan Construction Company v. DDA : 1999 (1) Arb. LR 272; Pandit Construction Company v. Delhi Development Authority and Anr : 2007 (3) Arb LR 205 (Delhi); and M/s Chander Kant & Co. v. The Vice Chairman, DDA & Ors : Arb. Pet. No.246 of 2005, decided on 26.05.2009.**

6. I have heard the learned counsel for parties.

7. In ***Chander Kant & Co (supra)***, a Division Bench of this Court was concerned with a petition under Section 11 (5) of the Act for appointment of an arbitrator. In that case, the work was completed on 11.10.1990 and the final bill was released on 07.11.2002. The petitioner therein invoked the arbitration clause by a notice dated 17.06.2004. As in the present case, the respondent therein had urged that failure to make demand for appointment of the arbitrator beyond the specified period of 90 days had resulted in forfeiture or waiver of the right to invoke the arbitration clause. The Division Bench noted the earlier decisions and concluded that the clause which restricts the period of limitation or provides for waiver of the right, if no action is commenced within the specified period, is violative of Section 28 of the Indian Contract Act, 1872 as amended.

8. In my view, the decision in ***Chander Kant & Co (supra)***, squarely covers the objection raised by the respondent in the present petition. Accordingly, the penultimate sub paragraph of the Arbitration clause which provides that “*if the any contractor(s) does/ do not make any demand for arbitration in respect of any claim (s) in writing within 90 days of receiving the intimation from the MTNL,*

that the bill is ready for payment, the claim of the contractor (s) will be demand to have been waived and absolutely barred and the MTNL shall be discharged and released of all liabilities under the contract in respect of these claims” is void.

9. In view of the above, the petition is allowed. It is directed that a sole arbitrator be appointed under the Rules of the Delhi International Arbitration Centre (DIAC). The representatives of the parties shall appear before the co-ordinator, DIAC on 04.10.2016 at 11:00 AM. The arbitration shall be conducted under the aegis of DIAC and in accordance with its Rules.

10. In above terms, the petition stands disposed of.

11. The Registry of this Court is directed to send a copy of this order to the co-ordinator, DIAC.

VIBHU BAKHRU, J

SEPTEMBER 20, 2016

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