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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ARB.P. 360/2016

B.L.KASHYAP&SONS LTD

..... Petitioner

Through: Mr.S.K. Maniktala, Mr. Swetab Kumar,
Mr. Vinod Kumar, Advocates.

versus

AIRPORT AUTHORITY OF INDIA

..... Respondent

Through: Mr. Digvijay Rai, Mr. Sayed Hassan
Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER

06.10.2016

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1.This petition under Section 11(6) of the Arbitration & Conciliation Act, 1996 ('Act') seeks reference to arbitration of the disputes arising between the parties out of an agreement dated 19th May, 2011 executed pursuant to an award of contract in favour of the Petitioner by the Respondent for the construction of 'New Expandable Modular Integrated Terminal Building at Vadodara Airport' for the value of Rs. 76,32,12,042.

2. The request for appointment of an Arbitrator is opposed by the Respondent on the ground that under the terms of the agreement, the Petitioner was obliged to first seek reference of the dispute before the Dispute Resolution Committee ('DRC') within a period of 90 days of the settlement of the final bill. It is stated that, in the present case, the request

for reference of the dispute to the DRC was not received within 90 days but only on 16th September, 2015 i.e., beyond the period of 90 days after final payment received by the contractor on 6th December, 2014. It is, therefore, stated that in terms of Clause 25 of the agreement, the Petitioner has lost its right to seek appointment of the Arbitrator and its claims should be “deemed to be waived and absolutely barred and the Respondent has been discharged and released of all liabilities under the contract in respect of the claims of the in respect of the claims of the Petitioner”.

3. It is further pointed out by the Respondent that the question of referring the dispute for arbitration does not arise since under Clause 25(v) only such disputes which have not attained finality can be referred for adjudication. Whereas, in the present case since the Petitioner did not seek reference of the dispute to the DRC in the first place within 90 days of receiving the intimation from the Respondent i.e., final bill was ready for payment, there is no surviving dispute for reference to arbitration. Learned counsel for the Respondent has sought to place reliance on the decision of the Supreme Court in *Wild Life Institute of India, Dehradun v. Vijay Kumar Garg (1997) 10 SCC 528*.

4. Learned counsel for the Petitioner, on the other hand, placed reliance on the decision of this Court in *Union of India v. Pt. Munshi Ram & Associates Pvt. Ltd. 2013 1 AD (Delhi) 801, Silicon Graphics Systems (India) P. Ltd. v. Sterling & Wilson Electricals P. Ltd. 2015(5) RAJ 409 (Delhi)* and the decision of the Division Bench of this Court in *Delhi Development Authority v. Bhardwaj Brothers 2014 (3) Arb LR 333(Delhi)*.

5. In *Union of India v. Pt. Munshi Ram* (*supra*) the Court was dealing with a clause similar to Clause 25 of the contract in the present case which stated that if no claim was made within 90 days of settlement of the final bill, then the contractor would be precluded from raising any claim. The Court explained the legal position that existed prior to the amendment of Section 28 of the Contract Act, 1872 (CA) which was governed by the decision in *The Vulcan Insurance Co. Ltd. v. Maharaj Singh* (1976) 1 SCC 943. It was held that the agreement that did not limit the period within which the party might enforce its right but provided for the forfeiture or waiver of the right if no suit was brought within the period stipulated in the agreement was outside the scope of Section 28 of the Contract Act and was binding on the parties. This was reiterated in *National Insurance Co. Ltd. v. Sujir Ganesh Nayar* (1997) 4 SCC 366. It was this legal position that was reiterated in *Wild Life Institute of India, Dehradun v. Vijay Kumar Garg* (*supra*). However, with effect from 8th January 1997, Section 28 of the CA was amended and read as under:

“28. Agreements in restraint of legal proceedings void.- Every agreement-

(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.”

6. In *Union of India v. Pt. Munshi Ram* (*supra*), this Court explains the legal position as under:

“9. The change brought about by the above amendment is that it also treats as void clauses of a contract which seek to extinguish right of any party or discharge any party from liability on the expiry of specified period so as to prevent an aggrieved party from enforcing its rights. After the enactment of the above amendment, a series of judgments were passed by the learned Single Judges of this Court holding that the distinction sought to be carved out by the earlier decisions in *The Vulcan Insurance Co. Ltd. v. Maharaj Singh*, *National Insurance Co. Ltd. v. Sujir Ganesh Nayak & Co.* and *Wild Life Institute of India, Dehradun v. Vijay Kumar Garg* did not survive. These decisions included *Hindustan Construction Company Limited v. Delhi Development Authority* 1999 (1) ArbLR 272, *Kalyan Chand Goyal v. Delhi Development Authority* 1998 (47) DRJ 772, *Explore Computers Pvt. Ltd. v. Cals Ltd.* and *Pandit Construction Company v. Delhi Development Authority*.

10. It may be noted that the decision of the learned Single Judge of this Court in *Pandit Construction Company v. Delhi Development Authority* (*supra*) also dealt with the issue whether the amendment would apply even where the contract was entered into prior to the date of the amendment. This was answered by holding that "though the contract may have been entered into before the amendment to the provision, starting from the preparation of the final bill everything has happened after the amended provision came into play and the amendment changing the substantive law, it would certainly apply to the contract at hand." The decision of the learned Single Judge has been upheld by the DB of this Court in *D.D.A. v. Pandit Construction Co.* [decision dated 19th April 2012 in FAO(OS) No.382 of 2007]. It has been held that "the position post January 08, 1997 would be that Clause 25 of the General Conditions of Contract would be void." On the facts of that case, it was noted that even though the agreement was dated 30th November 1990, i.e., prior to the amendment to Section 28 of the CA, "the work lingered on till April 28, 1998. The final bill was prepared on July 05, 1999 and intimation of it be finalized sent to the respondent on March 20, 2001." Reference was made to the decision

of the DB of this Court in *M/s. Chander Kant and Co. v. The Vice Chairman, DDA (supra)*, which held that the law as in force when a dispute arises has to be considered and not that in force when a contract is entered into.”

7. Accordingly, in *Pt. Munshi Ram (supra)*, this Court concurred with the view expressed by the Arbitrator that Clause 25 to the extent that it extinguishes the rights of the contractor to make any claims if not made within the prescribed period would be hit by Section 28 of the CA.

8. The above legal position was reiterated in *Silicon Graphics Systems (India) P. Ltd. v. Sterling & Wilson Electricals P. Ltd. (supra)*.

9. In that view of the matter, the Court is satisfied that in the present case, Clause 25 of the contract is contrary to Section 28 of the CA and cannot be sought to be enforced by the Respondent to defeat the right of the contractor to maintain the claim arising out of the contract.

10. There is, therefore, no merit in the objection raised by the Respondent for reference of the disputes to an Arbitrator.

11. The Court, accordingly, appoints Mr. V.B. Gupta, a former Judge of this Court, residing at 109, New Moti Bagh Complex, New Delhi, (Mobile No.9871300039) as an Arbitrator to adjudicate the disputes between the parties including their claims and counter claims. The arbitration shall take place under the aegis of the Delhi International Arbitration Centre (‘DAC’). The fee of the learned Arbitrator will be in terms of the Delhi High Court Arbitration Centre (Administrative Costs and Arbitrators’ Fees) Rules.

12. The petition is disposed of. A copy of this order be communicated to the learned Arbitrator as well as Additional Coordinator, DAC forthwith.

S. MURALIDHAR, J

OCTOBER 06, 2016

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