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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ARB.P. 676/2016**

CITY SWEEP SERVICES PVT. LTD. Petitioner

Through: Ms Manmeet Arora and Mr Sarad K.
Sunny, Advocates.

versus

SOUTH DELHI MUNICIPAL CORPORATION Respondent

Through: Ms Biju Rajesh, Advocate for
Gaurang Kanth, Advocates with Mr
Mahipal, AE, Central Zone, SDMC.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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30.11.2016

1. The petitioner has filed the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that an Arbitrator be appointed to adjudicate the disputes between the parties in relation to a contract dated 03.06.2011.
2. The contract entered into between the parties includes an arbitration clause, which reads as under:-

“12.2 Arbitration

If the parties are unable to resolve the Dispute by way of amicable settlement in accordance as above, the parties shall refer such Dispute for Arbitration. Any dispute or difference of any nature whatsoever or regarding any right, liability, act, omission or account

of any of the parties hereto arising out of or in relation to this Agreement shall be referred to the Sole Arbitration of the Commissioner of the MCD or some other Engineer of the MCD who may be nominated by the Commissioner. The Contractor will not be entitled to raise any objection to any such Arbitrator on the ground that the Arbitrator is an Engineer of the MCD or that he has to deal with the matters to which the contract relates or that in the course of his duties as an Engineer of the MCD he had expressed views on all or any of the matters in dispute or difference. In the event of the Arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, the Commissioner as aforesaid at the time of such transfer, vacation of office or inability to act, shall designate another person to act as Arbitrator in accordance with the terms of the Agreement such person shall be entitled to proceed with the reference from the point at which it was left by his predecessor. It is also a term of this Agreement that no person other than the Commissioner of the MCD as aforesaid shall act as Arbitrator as here under. The Award of the Arbitrator so appointed shall be final, conclusive and binding on all parties to the Agreement, subject to the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification/amendments of or re-enactment thereof and the rules made there under and for the time being in force shall apply to the Arbitration proceedings under this clause.”

3. The learned counsel for the respondent does not dispute the existence of the contract or the arbitration clause. However, she states that in terms of the arbitration clause, the power to appoint the Arbitrator vests with the Commissioner, MCD and, therefore, this Court ought not to exercise the said power.

4. It is not disputed that the parties had sought to amicably resolve the disputes. Further, it is also not disputed that the petitioner had invoked the arbitration clause on 09.04.2016 and, thereafter, on 18.09.2016. However, the learned counsel for the respondent submits that the notice issued on 09.04.2016 cannot be considered as a notice of invocation since parties had endeavoured to settle disputes amicably, thereafter. Be that as it may, since it is not disputed that the respondent failed to appoint the Arbitrator pursuant to the request made on 18.09.2016, an Arbitrator is required to be appointed by this court.

5. In **Datar Switchgear Ltd v. Tata Finance Ltd and Anr.:** (2000) 8 SCC 151, the Supreme Court had expressed the view that although no time for appointment of an Arbitrator is specified under Section 11(6) of the Act; however, if the party fails to appoint the Arbitrator prior to the petitioner approaching the Court, the party would forfeit its right to do so. The relevant extract of the said decision is quoted below:-

“18. In the present case, the respondent made the appointment before the appellant filed the application under Section 11 but the said appointment was made beyond 30 days. Question is whether in a case falling under Section 11(6), the opposite party cannot appoint an arbitrator after the expiry of 30 days from the date of demand?

19. So far as cases falling under Section 11(6) are concerned — such as the one before us — no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite

party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the court under Section 11, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited.”

6. In view of the above, an Arbitrator is required to be appointed by this Court. Accordingly, it is directed that Justice Manmohan Sarin (Retd.), former Chief Justice of Jammu & Kashmir High Court (Mobile No.9818000210) is appointed as a Sole Arbitrator to adjudicate the disputes between the parties. This is subject to the Arbitrator making the necessary disclosure under Section 12(1) of the Act and not being ineligible in terms of Section 12(5) of the Act.

7. It is seen that in terms of the arbitration clause, the Arbitrator is required to make an award within a period of three months from entering upon reference. The learned counsel for the parties state that the said time be enlarged to 12 months. It is accordingly, so directed.

8. The petition is disposed of.
9. Order *dasti*.

VIBHU BAKHRU, J

NOVEMBER 30, 2016
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