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

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Date of decision: March 16, 2018

+ **ARB.P. 181/2014**

SARVESH SECURITY SERVICES PVT LTD Petitioner

versus

MANAGING DIRECTOR, DSIIDC Respondent

+ **ARB.P. 196/2014**

SARVESH SECURITY SERVICES PVT LTD Petitioner

versus

MANAGING DIRECTOR, DSIIDC Respondent

Present: Ms. Sneha Singh, Adv. for the petitioner.
Mr. Divij Soni, Adv. for the respondents.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. These are two separate petitions filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as "the Act"*) seeking appointment of an arbitrator.

2. Some of the brief facts as contended are that the petitioner has been providing security services to the respondent from 01.03.2011. An Agreement was executed between the parties on the said date i.e. 01.03.2011 for providing security services for the period from 01.03.2011 to 30.06.2013 (Hereinafter referred to as the First Agreement). It is urged that on 01.07.2013, the Agreement was renewed for a period from 01.07.2013 to 30.06.2014 (Hereinafter referred to as the Second Agreement). Arbitration Petition 196/2014 pertains to the First Agreement dated 01.03.2011 whereas

Arbitration Petition 181/2014 pertains to the Second Agreement dated 01.07.2013.

3. I may also note that during the currency of the second agreement, the respondent issued a show cause notice to the petitioner as to why the petitioner be not blacklisted and debarred from participating in future contracts for the next three years. The petitioner sent a detailed reply to the said show cause notice on 14.03.2014. In the reply the petitioner sought to invoke both the arbitration agreements i.e. Arbitration Agreements dated 01.03.2011 and 01.07.2013.

4. The respondent have filed replies to both the petitions and have opposed the same. In reply to Arb.Pet. No.196/2014, which pertains to the first agreement, the respondent have pointed out that during the term of the second agreement dated 01.07.2013, the respondent issued a show cause notice to the petitioner as to why the agreement be not terminated and the petitioner be not blacklisted. It is urged that in response to the said notice which pertains to the second agreement, the petitioner vide their reply dated 14.03.2014 have sought to invoke the arbitration clause. This show cause notice pertains only to the second agreement and hence, this arbitration petition (Arb.Pet. No.196/2014) which relates to the first agreement is not maintainable as there is no invocation of the Arbitration Agreement. It is further pleaded that the reply dated 14.03.2014 sent by the petitioner to the show cause notice dated 05.03.2014 cannot be termed to be an invocation of an Arbitration Agreement.

5. In Arb. Pet. No.181/2014 which pertains to the second agreement, it is reiterated that the reply dated 14.03.2014 to the show cause notice cannot be treated as an invocation of Arbitration Agreement. It is stated that the

respondent is willing to appoint an arbitrator in terms of clause 60 of the contract once, a proper notice is given for appointment of an arbitrator identifying the 'specific disputes'.

6. The petitioner also filed OMP No.364/2014 under Section 9 of the Act seeking interim orders regarding the show cause notice dated 05.03.2014 issued by the respondent. This court on 24.03.2014 passed an order of status quo. However, prior to the said order itself, on 19.03.2014, the respondent issued an order of blacklisting the petitioner. The petitioner again filed a petition under Section 9 of the Act being OMP No. 368/2014. On 26.03.2014, a stay order was passed in favour of the petitioner.

7. The present petitions were filed sometimes in 2014. Parties have taken several dates to try and settle the matter but no progress has been made.

8. I have heard the learned counsel for the parties.

9. Learned counsel for the petitioner has pointed out that the invocation of the arbitration clause took place in the reply to the show cause notice on 14.03.2014. She reiterates that despite lapse of more than 30 days from the receipt of the said reply/invocation, no arbitrator was nominated by the respondent. She submits that now, in view of the filing of the present petition under Section 11(6) of the Act, the respondent have lost their right to nominate an arbitrator. She also points out that on 16.05.2014 in OMP 368/2014, the respondent have admitted that a sum of Rs.1,18,63,405/- is due to the petitioner out of which only 50 % has been paid.

10. Learned counsel for the respondent has however pleaded that only invocation of the arbitration regarding the Second Agreement took place which is the subject matter of Arb. Pet. No. 181/2014 vide reply dated 14.03.2014 to the Show Cause. It is further urged that as per the arbitration

clause in the second agreement, in case a dispute arises between the parties, the parties were to carry out a joint discussion and it is only thereafter that the matter was to be referred to the sole arbitrator to be appointed by the competent authority of the respondent. It is stated that no such joint discussion took place and hence, the present petition is pre-mature.

11. Regarding the first agreement, it is urged that no formal notice of invocation has been made. It is submitted that as the reply dated 14.03.2014 to the show cause notice cannot be treated as an invocation of the arbitration clause for the first agreement, hence, the present arbitration petition being Arb.Pet. No.196/2014 is not maintainable. The agreement expired on 31.05.2013 and hence, the said claim arising out of the said agreement is barred by limitation. Reliance is also placed on the judgment of the Supreme Court in the case of *Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729* to contend that the petitions of the respondent cannot be allowed.

12. In the First Agreement dated 01.03.2011, there exists an arbitration clause being Clause No. 28 which reads as follows:-

“28. Except as provided for in the contract, all disputes, differences shall be referred to arbitration of a sole arbitrator to be appointed by the Managing Director, DSIIDC. The arbitrator shall enter into reference and decide the dispute(s) as per the Arbitration and Conciliation Act, 1996.”

13. Regarding the Second Agreement dated 01.07.2013, the applicable clause is Clause 60 of the agreement which reads as under:-

“60. Dispute Resolution:

(a) Any dispute or difference arising out or relating to this contract will be resolved through joint discussion of the authorities representatives of the concerned parties. However, if

the disputes are not resolved by joint discussions then the matter will be referred for adjudication to a sole arbitrator appointed by the competent authority in DSIIDC Limited.

(b) The award of the sole arbitrator shall be final and binding on all the parties. The arbitration proceedings shall be governed by Indian Arbitration and Conciliation Act, 1996 as amended from time to time.

(c) The cost of Arbitration shall be borne by the respective parties in equal proportions. During the pendency of the arbitration proceeding and currency of the contract, neither party shall be entitled to suspend the work/service to which the dispute relates an account of arbitration and payment to the contract shall continue in terms of the contract. Arbitration proceedings will be held at Delhi/ New Delhi only.”

14. I may look at the communication dated 14.03.2014 sent by the petitioner, which is in response to the show cause notice dated 05.03.2014. It is the case of the petitioner that the request for Arbitration was made for both the Agreements by this communication. Some of the relevant portion of the communication reads as follows:

“Clause 60 of the terms and conditions titled as Dispute Resolution is reported here-in-below:

Dispute Resolution:

(a) Any dispute or difference arising out or relating to this contract will be resolved through joint discussion of the authorities’ representatives of the concerned parties. However, if the disputes are not resolved by joint discussions, then the matter will be referred for arbitration to a sole arbitrator by the competent authority in DSIIDCE Limited.

(b) The award of the sole arbitrator shall be final and binding on all the parties. The arbitration proceedings shall be governed by India Arbitration and Conciliation Act, 1996 as amended from time to time.

(c) ...During the pendency of the arbitration proceeding and currency of the contract neither party shall be entitled to

suspend the work/service to which the dispute relates on account of arbitration and payment to the contractor shall continue in terms of the contract....

Therefore, we request that a sole arbitrator may be appointed to resolve any dispute or difference, including the disputes raised in your letter dated 05.03.2014. In this regard, you would appreciate that not a single bill from 01.07.2013 has been paid amounting to Rs.2,08,48,582/- (Rupees Two Crore Eight Lacs Forty Eight Thousand Five Hundred and Eighty Two only) which is against clause 60(c) of the contract. You would appreciate that allegations howsoever eye catching and wild, needs to be supported by evidence only before the proper forum, i.e. the sole arbitrator.

.....

B. Reply on Merits:

Furthermore, from April, 2012 to November, 2012 payment of Rs.62,14,175.37 has been remained outstanding. From December, 2012 to May, 2013 no payment for relievers has been made by DSIIDC, and, the bill of June, 2013 of Rs.31,92,050/- still remains outstanding. All the payment made by DSIIDC has been on the basis of old rates and not the prevailing Minimum Wages. Therefore, it is requested that an impartial arbitrator may be appointed to adjudicate upon such disputes as per clause 28 of the Agreement dated 01.03.2011.

.....

7. We once again request your good self to abide by the terms of the contract and appoint an impartial sole arbitrator to adjudicate upon all the disputes/differences at the earliest and not take any coercive steps before the decision of the learned arbitrator.”

15. The contents of the above letter show that the petitioner has sought to invoke the arbitration clause, namely, clause 60 of the second agreement. The petitioner also states that from April, 2012 to May, 2013 payments are outstanding. This period pertains to the first agreement between the parties.

Thereafter, it is pleaded that an impartial arbitrator be appointed to adjudicate the disputes in terms of clause 28 of the first agreement dated 01.03.2011. Hence, by one single communication, the petitioner has sought to invoke the arbitration clause of the two separate agreements, namely agreement dated 01.03.2011 and agreement dated 01.07.2013. The plea of the respondent is that the communication dated 14.03.2014 by the petitioner is in response to a show cause notice which only pertains to the second agreement. Hence, the invocation for the two agreements could not have been done by this single communication. I may look at the legal position.

16. Section 21 of the Act, reads as follows:

“21. Commencement of arbitral proceedings.—Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.”

17. Hence, the arbitral proceedings commences on the date on which the request is made that the disputes be referred to arbitration. No particular format has been prescribed in the act for the purpose of making a request for reference of the disputes to arbitration.

18. Reference may be had to the judgment of the Supreme Court in *Milkfood Ltd. v. GMC Ice Cream (P). Ltd. (2004) 7 SCC 288* wherein the Supreme Court held as follows:-

"The UNCITRAL Model Rules of Arbitration vis-a-vis provision of Section 14 of the English Arbitration Act, 1996 must be construed having regard to the decisions of the English courts as also this Court which addressed the form of notice to be given in order to commence the arbitration for the purpose of Section 34(3) of the Limitation Act. By reason of Section 14, merely the form of notice and strict adherence thereto has become redundant, as now in terms of Section

14 of the Arbitration Act there is otherwise no specific requirement as to the form of notice subject to any contract operating in the field. (See paras 5-020, 5-027 and 5-028 of Russell on Arbitration, 22nd Edn.) Section 21 of the 1996 Act must be construed accordingly. It defines the moment of the commencement of arbitral proceedings."

19. On the form of notice, an appropriate interpretation has also been stated in the Law Relating To ARBITRATION AND CONCILIATION, Ninth Edition by Learned Author Dr. P.C. Markanda, Mr.Naresh Markanda and Mr.Rajesh Markanda (LexisNexis). The learned authors have stated as follows:-

"A "notice of arbitration" is a written communication by which the reference may be initiated. In the absence of any requirement contained in the arbitration agreement there are no specific requirements as to the form of the notice. The usual manner is writing of a letter by the claimants to the respondents seeking arbitration alongwith with list of quantified disputes, if so required by the terms of the arbitration agreement.

The giving of such notice is a matter *inter partes* and is a procedural and not a decisive step. Accordingly, its form and terms do not call for excessively strict scrutiny. If, in substance, a party communicates (i) an intention to resort to arbitration, and (ii) a requirement that the other party should do something on his part in that regard, this will in general suffice to define the commencement of arbitration."

Clearly, no particular format is required for the purpose of invocation of the Arbitration Clause. The only requirement would be that with sufficient clarity petitioner should be able to communicate the invocation of the arbitration clause.

20. As noted above, a perusal of the communication dated 14.03.2014 clearly shows that the petitioner has sought invocation of arbitration for the

first agreement and also for the second agreement. It is manifest that the said reply to show cause notice dated 05.03.2014 fulfills the requirement of Section 21 of the Act inasmuch as a clear request has been made to refer the disputes to arbitration by the petitioner for both the agreements.

21. The respondent has placed reliance on the judgment of the Supreme Court in the case of ***Duro Felguera, S.A. v. Gangavaram Port Ltd.*** (supra), to contend that the petitioner could not invoke the Arbitration Clause of two separate Agreements by one communication. In the said judgment the court held as follows:

“38. The submission of GPL is that since reference to Original Package No. 4 TD is made in MoU, the arbitration clause is incorporated in the MoU and there has to be a “*composite reference*” for settling the disputes under different contracts by constitution of single Arbitral Tribunal for dealing with the international commercial arbitration. As discussed earlier, as per the amended provision of sub-section (6-A) of Section 11, the power of the court is only to examine the existence of arbitration agreement. When there are five separate contracts each having independent existence with separate arbitration clauses, that is, New Package No. 4 (with foreign company Duro Felguera) and Packages Nos. 6, 7, 8 and 9 [with Indian subsidiary (FGI)] based on MoU and Corporate Guarantee, there cannot be a single Arbitral Tribunal for “*international commercial arbitration.*”

22. The facts of the aforesaid judgment clearly have no application to the facts of the present case. That was a case in which initially the respondent invited tenders/bids with respect to the various aspects of the Sea Port. After discussion, the original contract was divided into five different packages. Five different contracts were entered into of which, one contract was for the foreign company and four contracts were given for the Indian company. A

separate corporate guarantee was executed guaranteeing due performance of the work. It was pleaded by the petitioners that five different letters of award and five different contracts were substantially different, independent and separate and there cannot be a composite reference for efficacious settlement of disputes. Reference to the arbitration will have to be to multiple arbitral tribunals though the arbitrator may be same. The respondent however, took a different contention seeking a composite reference as the works are interconnected and interlinked. The Supreme Court in the facts of the case held that there are five distinct contracts pertaining to the five different works and the 6th Contract is the corporate guarantee. The plea for the composite reference was rejected by the Supreme Court.

23. I may point out that the facts of the present case are different. The petitioner is not seeking a composite reference. The invocation of the arbitration clause has only been done through a common communication. Other than that two separate arbitration petitions have been filed seeking two separate references to arbitration for the separate arbitration agreements. Hence, facts of the present case are entirely different and do not support the contentions of the respondent.

24. The next contention of the respondent pertains only to Arb.Pet. 181/2014 namely, that under the Second Agreement, the parties had to first try and resolve the disputes through joint discussion and the same has not been done here and hence this petition (i.e. Arb.Pet. 181/2014) is premature . A perusal of the communication dated 14.03.2014 would show that the petitioner has referred to a letter dated 16.12.2013 where it has been clearly requested that a meeting be scheduled at the earliest in case any clarifications are required by the respondent. It is clear that the petitioner has made a

request for a joint meeting for joint discussion as provided in the Arbitration Clause. Hence, there is no merit in the said contention of the respondent.

25. Even otherwise a learned Single Judge of this court in ***Ravinder Kumar Verma v. BPTP Ltd., 2015 (147) DRJ 175***, has held that such a clause is only directory. In that case this Court was dealing with the following Arbitration clause:

“All and any disputes arising out of or touching upon or in relation to the terms of this application and/or Standard Floor Buyer's Agreement including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussion failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration & Conciliation Act, 1996, or any statutory amendments/modifications thereof for the time being in force. The arbitration proceedings shall be held at an appropriate location in New Delhi by a sole arbitrator appointed by the Company. The applicant(s) hereby confirms that he/she shall have or raise no objection to this appointment. The Courts at New Delhi alone shall have the jurisdiction in all matter arising out of/touching and/or concerning this application and/or Floor Buyers agreement regardless of the place of execution of this application which is deemed to be at New Delhi.”

While interpreting the above clause, this court held as follows:

“8(i). In my opinion, there are two other reasons, and which are in addition to the reasoning given in the case of Saraswati Construction Co. (supra) for holding that a prior requirement to be complied with before seeking reference of disputes to the arbitration is only directory and not mandatory.

(ii) The first reason is that if the arbitration clause is read in a mandatory manner with respect to prior requirement to be complied with before invoking arbitration, the same can result in serious and grave prejudice to a party who is seeking to invoke

arbitration because the time consumed in conciliation proceedings before seeking invocation of arbitration is not exempted from limitation under any of the provisions of the Limitation Act, 1963 including its Section 14. Once there is no provision to exclude the period spent in conciliation proceedings, it is perfectly possible that if conciliation proceedings continue when the limitation period expires the same will result in nullifying the arbitration clause on account of the same not capable of being invoked on account of bar of limitation i.e when proceedings for reference to arbitration are filed in court, the right to seek arbitration may end up being beyond three years of arising of the disputes and hence the petition for reference may be barred by limitation. Another example would make this position clear that suppose on the last date of limitation period of three years a party wants to invoke an arbitration clause but the arbitration clause contains the requirement of invoking the precondition of 'mutual discussion'. Surely, on the last date if a notice has to be given for invoking mutual discussion, no mutual discussion or conciliation can take place on the same date of the notice itself i.e., no mutual discussion can take place before expiry of the period of limitation which expires on that very day on which the notice for mutual discussion is given. Therefore, if the pre-condition of mutual discussion is treated as mandatory, valuable rights of getting disputes decided by arbitration will get extinguished and which is not a position which should be acceptable in law.

9 (i). Any doubt on this aspect as to whether conciliation proceedings as required by an arbitration clause are directory or mandatory is removed when we refer to Section 77 of the Act, and which is the second reason that the pre-condition of mutual discussion is only a directory requirement and not a mandatory one. Section 77 of the Act states that in spite of conciliation proceedings going on, the existence of the same will not prevent any of the parties to exercise its rights in accordance with law. Section 77 of the Act reads as under:-

“Section 77. Resort to arbitral or judicial proceedings.- The parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the

subject-matter of the conciliation proceedings except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights."

(ii) Section 77 of the Act specifically uses the expression proceedings which are necessary for preserving rights and therefore if rights are to be preserved on account of limitation expiring, because after expiry of the period of limitation arbitration clause cannot be invoked either by filing of a petition under Section 8 of the Act or under Section 11 of the Act, therefore, existence of conciliation proceedings or mutual discussion should not be a bar for enforcing rights to arbitration either by filing a petition under Section 11 of the Act or by seeking to get the suit dismissed by filing an application under Section 8 of the Act because such proceedings are necessary to preserve rights of getting the disputes decided by arbitration."

26. Clause 60 of the agreements between the parties merely states that the parties shall endeavour to resolve all disputes through joint discussions of the authorized representatives of the parties. If the disputes are not resolved by the joint discussion, then the matter shall be referred to the sole arbitrator. Other than that no specific procedure is prescribed as to how the parties are to try and resolve the disputes. As per the judgment of the learned Single Judge of this court in the above case of **Ravinder Kumar Verma v.BPTP Ltd.**(supra) the procedure for amicable settlement as provided in said clause 60 of the second agreement would be merely directory and in case of failure of the petitioner to abide by those terms, no fault could be found in the act of the petitioner in invoking the arbitration clause and filing of the present petition. However as noted above, even on facts in my opinion the requirements of joint discussion as stated in Clause 60 of the Second Agreement are fulfilled in the facts of this case in view of letter dated 16.12.2013 sent by the petitioner seeking a joint meeting. There is no merit

in the said plea of the petitioner.

27. Keeping in view the above finding, the respondent, despite receipt of the invocation of arbitration dated 14.03.2014 (Reply to Show Cause), have not taken any steps to appoint Arbitrator in terms of the Clause 28 of the First Agreement and Clause 60 of the Second Agreement.

28. The Supreme Court in the case of ***Deep Trading Company vs. Indian Oil Corporation & Ors., (2013) 4 SCC 35*** held as follows:-

“16. In *Datar Switchgears Ltd. v. Tata Finance Ltd. and Anr.* (2000) 8 SCC 151, a two-Judge Bench of this Court considered the scheme of Section 11, noted the distinguishing features between Section 11(5) and Section 11(6) and then considered the question whether in a case falling under Section 11(6), the opposite party cannot appoint an arbitrator after the expiry of thirty days from the date of demand. This Court held that in cases arising under Section 11(6), if the opposite party has not made an appointment within thirty days of the demand, the right to make appointment is not forfeited but continues, but such an appointment has to be made before the first party makes application under Section 11 seeking appointment of an arbitrator. If no appointment has been made by the opposite party till application under Section 11(6) has been made, the right of the opposite party to make appointment ceases and is forfeited.

17. In *Punj Lloyd Ltd. v. Petronet MHB Ltd.* (2006) 2 SCC 638, the agreement entered into between the parties contained arbitration clause. The disputes and differences arose between the parties. Punj Lloyd (Appellant) served a notice on Petronet (Respondent) demanding appointment of an arbitrator and reference of disputes to him. Petronet failed to act. On expiry of thirty days, Punj Lloyd moved the Chief Justice of the High Court for appointment of the arbitrator under Section 11(6). Petronet

had not made appointment till the date of moving the application. The designate Judge refused to appoint the arbitrator holding that the remedy available to it was to move in accordance with the agreement. Aggrieved by the said order, a writ petition was filed which was dismissed and the matter reached this Court. A three-Judge Bench of this Court referred to *Datar Switchgears Ltd. v. Tata Finance Ltd. and Anr.* (2000) 8 SCC 151 and held that the matter was covered squarely by that judgment and the view taken by the designate Judge in dealing with the application under Section 11(6) and the Division Bench was not right. This Court restored the application under Section 11(6) before the Chief Justice of the High Court for fresh consideration and appointment of the arbitrator in accordance with Section 11(6).

18. We are in full agreement with the legal position stated by this Court in *Datar Switchgears Ltd. v. Tata Finance Ltd. and Anr.* (2000) 8 SCC 151 which has also been followed in *Punj Lloyd Ltd. v. Petronet MHB Ltd.* (2006) 2 SCC 638.”

29. It is manifest that once a party invokes the arbitration clause, in a case falling under Section 11 (6) of the Act, the opposite party is as per settled legal position obliged to appoint an arbitrator within 30 days of the demand. In case the opposite party does not appoint an arbitrator within 30 days of the demand, the right to make the appointment continues till the first party makes an application under Section 11 of the Act.

30. In the present case, the petitioner has invoked the arbitration clause on 14.03.2014. The petitioner has thereafter filed the present petitions under Section 11(6) of the Act. I may note that though no such plea has been raised by the respondent, Arb.Pet. No.181/2014 pertaining to the second agreement was filed on 03.04.2014 whereas Arb.Pet. 196/2014 pertaining to the first

agreement was filed on 21.04.2015. Hence, the arbitration petition No.181/2014 has been filed before lapse of 30 days from the date of invocation of the arbitration clause by communication dated 14.03.2014. However, we are now in 2018. Even till date, the respondent have not attempted to appoint an arbitrator in terms of the arbitration clause. They continue to oppose the appointment of the arbitrator in the facts of the case. They continue to plead that first an attempt should have been made for joint discussions. I have already rejected the above contention of the respondent holding that the petitioner did invite the respondent for joint discussions to which they did not respond. Further, in any case, the said procedure cannot be said to be mandatory for the purpose of filing of the present arbitration petition. Clearly the respondent have failed to perform the function entrusted to them as per Clause 60 of the Agreement. It is manifest that the respondent has forfeited its right to make the appointment of an arbitrator.

31. In view of the above facts, this court appoints Mr. Justice K.K.Lahoti (Retired) (Mobile No.09425152000) as the Sole Arbitrator to adjudicate the disputes between the parties. The said Arbitrator may adjudicate all the disputes which are subject matter of both the agreements. The adjudication shall take place separately. The learned Arbitrator will fix his fees in consultation with the learned counsel for the parties. The learned Arbitrator may also comply with provisions of Section 12(1) of the Act.

32. The petitions stand disposed of.

(JAYANT NATH)
JUDGE

MARCH 16, 2018
rb/v