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

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Judgment delivered on: 13.09.2017

+ ARB.P. 523/2017

VIJAY POWER GENERATORS LTD

..... Petitioner

versus

NEW DELHI MUNICIPAL COUNCIL & ANR. Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. M.S.Rahman, Adv.

For the Respondents : Mr. Anil Grover, Standing Counsel with Ms. Kanika Singh, Mr. Jitendra Kr. Tripathi, Mr. Rishi Vohra and Mr. Mishal Vij, Advs.

**CORAM:-
HON'BLE MR JUSTICE SANJEEV SACHDEVA**

JUDGMENT

SANJEEV SACHDEVA, J. (ORAL)

1. By this petition under Section 11 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the Act), the petitioner seeks appointment of Sole Independent Arbitrator to adjudicate the disputes between the parties.

2. The petitioner was awarded the work relating to replacement of 200 KV A DG Sets at Palika Kendra Building.

3. As per the petitioner, the petitioner duly completed the work, however, the payment was not released leading the petitioner invoking the arbitration clause.

4. The arbitration clause between the parties as contained in the agreement reads as under:-

“CLAUSE 36.0 Settlement of disputes by arbitration:

Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specification, designs, drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used or the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment there or shall be referred to the sole Arbitration of the person appointed by the Chairperson NDMC, at the time of dispute if there be no Chairperson, the administrative head of the NDMC at the time of such appointment. There will be no objection to any such appointment if the arbitrator so appointed is a Government servant or NDMC employees and that he had to deal with the matters which the contract relates and that in the course of duties as Govt. servant or NDMC employees he had expressed views on all or any the matters in dispute or difference. The arbitrator whom the matter is originally referred being transferred or vacating his office of being unable to act for any reason, the chairperson of administrative head as aforesaid at the time of such transfer vacation of office or liability to act shall appoint another person to act shall as arbitrator

in accordance with the terms 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 by the Chairperson or administrative head of the NDMC as aforesaid act should act as arbitrator and all. In this case, parties have agreed that the arbitrator or umpire will give reason for the award. Subject as aforesaid, the provisions of the arbitration Act, 1940 or any statutory modification or enactment thereof and the rules made there under and for the time being informed shall apply to the arbitration proceedings under this clause. The arbitrator(s) may from time to time with the consent of the parties, enlarge the time for making and publishing the award.

It is also a term of the contract that if the contractor does not make any demand for arbitration in respect of any claim(s) in writing within 90 days of receiving the intimation from the NDMC that the final bill is ready for payment the claim of the contractor shall be deemed to have been waived and absolutely barred and the NDMC shall be discharged and released of all liabilities under the contract in respect of these claims.

It is a term of this contract that the party invoking arbitration shall specify the disputes to be referred to arbitration under this clause together with the amount(s) in respect of each dispute. Notwithstanding anything contained in this agreement the parties shall not be entitled to revoke reference of dispute to the Arbitration after acceptance of the final payment until it is so recorded on the bill that the same was being received under protest.”

5. The petitioner invoked arbitration clause vide notice dated 26.12.2015 which was followed by reminder dated 05.08.2016.

6. The petition was initially filed on 20.02.2017, but remained under defect and was re-filed on 11.08.2017. Since the petition was not refiled within the permitted period, the petition shall be deemed to have been filed on 11.08.2017.

7. Learned counsel for the respondent submits that the Arbitrator has been appointed by the competent authority on 12.09.2017.

8. Perusal of order dated 21.08.2017 shows that the respondent was present when the petition was listed. Admittedly, the power to appoint Arbitrator has been exercised by the Respondent after the petitioner has filed this petition and much after the expiry of the period of 30 days as contemplated by the Act.

9. In view of the judgment of Supreme Court in the case of **DATAR SWITCHGEARS LTD VS. TATA FINANCE LTD. & ANR** (2000) 8 SCC 151, the respondents have forfeited their right to appoint an Arbitrator in terms of the arbitration clause. Accordingly, a Sole Independent Arbitrator is liable to be appointed.

10. Learned counsel for the respondent submits that, without prejudice to her rights and contentions on merits of the claim, she has no objection to the appointment of a Sole Arbitrator by this court to adjudicate the disputes between the parties.

11. Accordingly, Mr. Rishi Manchanda Advocate (Mob # 9911681178) is appointed as the Sole Arbitrator to adjudicate the

disputes between the parties. This is subject to the Arbitrator making the necessary disclosure under Section 12 of the Act of not being ineligible under Section 12(5) of the Act.

12. The Arbitral Tribunal shall examine the claims of the petitioner and the counter claims, if any of the respondents.

13. The fee of the Arbitrator shall be fixed in accordance with Schedule IV of the Act.

14. The parties are at liberty to approach the learned Arbitrator for elucidating the necessary disclosures and for further proceedings.

15. The petition is accordingly disposed of.

16. Order *Dasti* under signatures of the Court Master.

SANJEEV SACHDEVA, J

SEPTEMBER 13, 2017

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