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

% ***Date of decision:*** 16.10.2017

+ ARB.P. 224/2017

D.D.PRADHAN & CO. PVT. LTD Petitioner
Through Mr.Vikram Kumar and Ms.Poonam
Kumar, Advs.

versus

UMAK EDUCATIONAL TRUST Respondent
Through Mr.Pradeep Aggarwal and Mr.Deep
Dhamija, Advs.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.(ORAL)

1. This petition is 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 basic facts are that the parties entered into an agreement on 07.11.2011 whereby the petitioner was to carry out the work of plumbing and fire fighting equipment etc. for the respondent. The case of the petitioner is that there is an outstanding of Rs.91,63,443.50/- unpaid. The petitioner through its advocate issued a notice invoking the arbitration clause on 04.01.2017. As no steps were taken by the respondent, the present petition has been filed.
3. I have heard learned counsel for the parties.
4. Learned counsel for the respondent does not dispute the existence of an arbitration agreement. He, however, submits that the present petition is

pre-mature as in terms of Clause 4.10.1 of the Agreement between the parties, he urges, the petitioner has failed to take steps for reference of disputes to the owner (respondent). He submits that this procedure as prescribed prior to the arbitration process is a mandatory process. He relies upon the judgment of this court in the case of *M/s Haldiram Manufacturing Company Pvt. Ltd. vs. M/s DLF Commercial Complexes Ltd., 193(2012) DLT 410* and the judgment of the Kerala High Court in the case of *Nirman Sindia vs. M/s Indal Eletromelts Ltd., Coimbatore & Ors., AIR 1999 Kerala 440*.

5. Para 4.10.1 and 4.10.2 of the Agreement between the parties reads as follows:-

“4.10.1 Matter to be Settled by Owner: All disputes and differences of any kind whatsoever arising out of or in connection with Contractor whether during the progress of the works or after their completion shall be referred by the Contractor to the Owner and the Owner shall within a reasonable time after their presentation make and notify decisions thereon in writing.

The decisions, directions, classifications, measurements, drawings and certificates with respect to any matter the decision for which is specially provided for, by these or other special conditions to be given and made by the Employer or by the Interior Designers on behalf of the Employer are matters which are referred to hereinafter as Excepted matters and shall be final and binding upon the Contractor and shall not be set aside on account of non-observance of any formality, any omission delay or error in proceeding in or about the same or on any other grounds or for any reason and shall be without appeal.

4.10.2 Arbitration:

In the event of any dispute or difference between the parties hereto as to the Project or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the of any certificate to which the Contractor may claim to be entitled, or if the Employer fails to make a decision within reasonable time, then and in any such case, but except in any of the Excepted Matters referred to in the above clause, the Contractor after 90 days of his presenting his final claim in the disputes matters, may demand in writing that the dispute or difference be referred for arbitration. Such demand for arbitration shall specify the matters which are in question, dispute or difference, and only such dispute or difference other than Excepted Matters of which the demand has been made and no other dispute or difference shall be referred for arbitration to THE TRUSTEE, to be named later, of UMAK EDUCATIONAL TRUST at the relevant time as per the provisions of the Indian Arbitration Act 1996, for the time being in force or of any other Act of the Legislature passed in substitution thereof or modification thereof and for the time being in force shall apply to such arbitration.

The Contractor shall not, except with the consent in writing of the Owner/Project Manager, in any way delay the carrying out of the work by reason of any such matter, question or dispute being referred to arbitration but shall proceed with the work with all due diligence and shall, until the decision of the arbitration is given, abide by the decision of the Project Manager and no award of the arbitrator shall relieve the Contractor of his obligation to adhere strictly to the Project Manager's instructions with regard to the actual carrying out of the work except as specifically affected by such award."

6. The contention of the respondent is that as per clause 4.10.1, the petitioner was obliged to refer the disputes pertaining to the decisions, directions, classifications, measurements, drawings and certificates first to the employer (respondent) who shall thereafter take a decision accordingly

and thereafter, he urges that clause 4.10.2 can be invoked.

7. In the present case, I may note that the petitioner had sent a legal notice on 04.01.2017. The prayer clause of the notice reads as follows:-

“6. That in view of Clause 4.10.2 of the Tender Agreement dated 07.11.2011 executed between, which calls notice to refer the dispute for Arbitration as per the provisions of The Arbitration and Conciliation Act, 1996.

In view of the above by way of this Legal Notice I call upon you the addressee to pay outstanding sum of Rs.91,63,443.50 alongwith interest @18% per annum calculated from 04.08.2014 to my client or in alternative refer the dispute for Arbitration as per the provisions of The Arbitration and Conciliation Act, 1996. In failure to comply the terms of the Legal Notice within 30 days, my client shall be at liberty to approach Hon'ble High Court of Delhi for appointment of an independent Arbitrator in accordance with the provisions of the Arbitration and Conciliation Act, 1996 having its venue at New Delhi in clew of Arbitration Clause 4 .10. 2 mentioned in the Tender Agreement and in that case, you the addressee will be squarely liable for all costs, Court expenses and other consequences.”

8. Hence, the nature of disputes was elaborated and the respondent were requested to refer the disputes for arbitration as per the provisions of the Arbitration and Conciliation act.

9. Despite two hearings have taken place, no reply has been filed by the respondent. Today in court a submission was sought to be made that the aforesaid notice was not received. I do not accept this contention as no reply has been filed by the respondent. There is no pleading of the respondent on record. The courier receipts by which the aforesaid notice was dispatched have been placed on record. I accept the same.

10. As the respondent have received this legal notice, the respondent could have taken the requisite steps/decision in terms of clause 4.10.1. It is true that the legal notice dated 04.01.2017 does not make a specific reference to clause 4.10.1 of the agreement. That by itself would not mean that the procedure as stated in clause 4.10.1/4.10.2 has not been followed by the petitioner. The omission in the notice to mention clause 4.10.1 of the agreement is a minor infraction and it cannot be urged that there was non-compliance of a mandatory provisions.

11. This court in the case of *M/s Haldiram Manufacturing Company Pvt. Ltd. vs. M/s DLF Commercial Complexes Ltd.(supra)* was dealing with an application under Section 8 of the Arbitration Act. The exact arbitration clause is not reproduced in the judgment. However, in para 13, the Court held as follows:

“13. The controversy in hand does not come to an end here as the arbitration clause under consideration has another dimension. It would be manifest on perusal of the above arbitration clause that the disputes arising between the parties at the first instance were to be mandatorily settled amicably by mutual discussion as the word used is shall in the clause and it is only on the failure of any settlement arrived at between the parties after the mutual discussion, the other alternative was the settlement of the disputes through arbitration. Hence, clearly the first step stipulated in the said clause is the settlement of disputes through mutual discussion and second step is the settlement through arbitration. The Forum of Arbitration was, therefore, made dependent on the outcome of the first step that is of mutual settlement.”

12. Similarly, the Kerala High Court in the case of *Nirman Sindia vs. M/s Indal Eletromelts Ltd., Coimbatore & Ors.(supra)* was dealing with a case

where the arbitration clause provided that prior to arbitration, the matter was to refer to an adjudicator within 14 days of notification of the Engineer's decision. A detailed procedure as to how the dispute was to be decided was stated and the decision of the adjudicator was to be referred to the arbitrator. In that case the Court held as follows;-

“8. Therefore, it is clear that the applicant either refused to comply or prevented compliance of the procedure laid down or the preceding steps to enforce the arbitration clause in the agreement. The applicant who has been responsible for preventing or frustrating the operation of the earlier or preceding steps for enforcing the arbitration clause in the agreement, cannot seek arbitration by contending that the 1st respondent has not complied with the request for appointment of arbitrator as provided in the agreement. A scrutiny of the Clause s 24 and 25 of Ext. P4 agreement clearly establishes that the applicant and the 1st respondent agreed to settle the disputes through arbitration and such reference to arbitration should be preceded by a decision by the Engineer and a challenge to that decision before the adjudicator by the aggrieved party within the time prescribed under those clauses. Without resorting to those essential or preceding steps for arbitration, or the parties to the contract waiving those steps, the provisions of Ext. P4 agreement prohibits either party from enforcing the arbitration clause.”

13. The aforesaid judgments of the Delhi High Court and the Kerala High Court relied upon by the petitioner deal with the matters where the Court came to a conclusion that the procedure prescribed before going for arbitration was a mandatory provision and the provision has not been complied with. These judgments would not apply to the present case as the respondent has complied with the provision.

14. Accordingly, I allow the present petition. Mr.K.K.Nangia, Advocate

(Former Registrar, Delhi High Court) (Mobile No.9910390945) is appointed as the sole arbitrator to adjudicate the disputes between the parties. The arbitration proceedings shall take place under the aegis of the Delhi International Arbitration Centre (DIAC). A copy of this order be sent to DIAC.

15. Needless to add, this order is passed without prejudice to the rights and contentions of the parties. Parties are at liberty to raise all their submissions before the learned Arbitrator.

16. The petition stands disposed of.

JAYANT NATH, J

OCTOBER 16, 2017/rb