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

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+ **ARB.P. 638/2016 & I.A. 12946/2016**

EXPLO MEDIA PVT. LTD.

..... Petitioner

Through: Mr. Rakesh Khanna, Senior Advocate
with Mr Avadh Kaushik, Mr Anand Mishra, Mr.
Hemant Kumar Ms Mahima Rathi, Advocates.

versus

SOUTH DELHI MUNICIPAL CORPORATION

..... Respondent

Through: Mr. Sanjay Poddar, Senior Advocate
with Mr. Mukesh Gupta and Mr P.S. Jha,
Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER

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17.02.2017

1. This is a petition under Section 11(6) of the Arbitration & Conciliation Act, 1996 seeking appointment of a Sole Arbitrator to adjudicate the disputes between the Petitioner, Explo Media Pvt. Ltd. (EMPL), and the Respondent, South Delhi Municipal Corporation ('SDMC'), arising out of a contract whereby the Petitioner was could display advertisements on 50 Unipole sites.

2. A preliminary objection is raised regarding the existence of an arbitration clause in the agreement between the parties. Preceding the filing of the present petition, EMPL sent SDMC a notice dated 23rd May, 2016 invoking the arbitration clause in which the principal grievance was that SDMC was

not coming forth to reconcile the accounts pertaining to 14 unipole sites. In the said notice, in paragraph 37, EMPL referred to Clause 28(A) of the Contract/Agreement/NIT which contained the following arbitration clause:

“Any controversy or dispute arising out of the permission granted to the advertiser, for display of advertisement through Unipole on street light poles in the MCD area shall be referred to the sole arbitration of the Commissioner MCD or any other officer nominated by him in this behalf either by himself or on party's request...”

3. EMPL called upon SDMC to decide the name of the arbitrator in consultation with it.

4. In the reply to this petition, it is pointed out in para 9 as under:

“9. It is submitted that vide allotment letter(s), the allotment of site has been made as per the terms and conditions of the contract/NIT. It is submitted that as per the terms and conditions of the contract, agreement/contract and allotment letter, there is no arbitration clause in respect of following sites shown in the notice dated 6.6.2015:

- (i) Site at parking, Max Hospital,
- (ii) Flag sign site at South Extension Part-I,
- (iii) Flag sign site at South Extension Part-II,
- (iv) Flag sign site at Greater Kailash Part-I,
- (v) Site at Toilet Block, Kalkaji,
- (vi) Unipole site at Polo Ground, FTC, IIT to Mehrauli.
- (vii) Wallwraps at DLF Promenade Mall, Vasant Kunj,
- (viii) Wallwraps at DLF Promenade Mall, Saket.”

5. In para 10, it is asserted by SDMC that in respect of the Unipole sites mentioned in the said NIT at DT Cinema, Greater Kailash Part-II, there was

no arbitration clause. In para 11 it is stated that in respect of the Unipole sites at Shahidi Park, Site at Qutub T -Point and Site at Munirka, there was no formal contract executed and there was no specific agreement entered into. It is further pointed out that as per the terms and conditions of the NIT, the arbitration agreement was in respect of 3 sites only.

6. In its rejoinder EMPL has by way of the para-wise reply to para 9 of the counter affidavit stated as under:

“That the contents of para 9 are false, frivolous and misleading and very clearly show malafide of the Respondent. That the Respondent has submitted a list of 8 sites wherein, as per it, there is no arbitration clause as per the terms and conditions of the contract/ agreement. It is most humbly submitted that the Site at parking, Max Hospital has arbitration clause in the specific agreement and, false documents have been filed by the Respondent alleging that there is no arbitration clause with regard to the said site. That the Respondent has wilfully filed the wrong document, which do not have arbitration clause whereas, the document signed by the Petitioner for the said site bears arbitration clause. A copy of the correct agreement is annexed herewith and is marked as Annexure-B.”

7. As can be noticed, what has been filed with the rejoinder as Annexure B is an agreement concerning the site at Max Hospital. However, this is not a signed copy. Mr Sanjay Poddar, learned senior counsel for SDMC states that what has been filed by SDMC along with its documents is a copy of the signed agreement for the unipole at Max Hospital parking which does not contain any arbitration clause.

8. At this stage, Mr Rakesh Khanna, learned Senior counsel appearing for EMPL, sought some time to produce the copies of the various agreements. Apart from the fact that SDMC has filed copies of all the relevant agreements for the unipoles at various sites, there was sufficient time for EMPL to have produced copies of the agreements containing arbitration clauses if any. The Court is not inclined to grant any further time to EMPL for that purpose. Consequently, of the sites in respect of which claims are sought to be raised by EMPL, only the agreement in regard to the unipole at Ashram has an arbitration clause in the agreement.

9. The above fact is significant from the point of view of the notice issued by EMPL to SDMC invoking arbitration clause. As is already noted, the said notice made a grievance essentially about the failure of SDMC to reconcile the accounts. It did not raise any specific demand regarding the amount owed to EMPL by SDMC. At best it was a notice *qua* the dispute arising out of the agreement for the unipole at Ashram and not for the other sites.

10. Mr Poddar states, on instructions, that as regards the Ashram unipole, what has been retained by SDMC is the security deposit of Rs. 10,33,850. According to EMPL the amount together with interest works out to Rs. 27,70,698/-. Mr Poddar states that SDMC is prepared to appoint a former Judge of this Court as Sole Arbitrator not later than 30 days from today to adjudicate the said dispute.

11. In view of the above statement, which is taken on record, the Court does not consider it necessary to issue a specific direction referring the said dispute to arbitration. In the event SDMC fails to comply with the above

assurance within 30 days, it will be open to EMPL to apply to the Court for that limited purpose.

12. However, as regards the disputes pertaining to the other sites, SDMC's objection as regards the absence of an arbitration clause appears to be justified at this stage.

13. It require to be noted at this stage that prior to sending to SDMC the above arbitration notice dated 23rd May, 2016, EMPL had sent it a notice on 6th June, 2015 raising claims in respect of several unipoles which included sites not only within the jurisdiction of SDMC, but those that fall within the jurisdiction of the North DMC. Before the Court, a chart has been submitted by Mr. Khanna giving the details of as many as 31 sites and setting out the demands made by SDMC as well as EMPL *qua* each of those sites as well as the refund pending. SDMC's demand, as given in the chart, for 14 of the sites inclusive of interest is Rs. 6,99,63,076/-. However, in respect of these very 14 sites, EMPL claims that Rs. 4,11,37,277 is owed to it. Further, EMPL has also claimed a sum of Rs. 2,15,86,615/- towards refund of the security deposit in respect of 14 other sites.

14. The fact remains that EMPL has not yet sent SDMC notices invoking the arbitration clause, if any, and quantifying the claim *qua* each of the sites (other than the unipole at Ashram). Mr Khanna referred to the Outdoor Advertisement Policy (OAP) finalized on 10th September, 2007 which contained an arbitration clause. However, Mr Poddar referred to the decision of this Court dated 18th November, 2014 in W.P. (C) No. 4436/2014 *Sports & Leisure Apparel Ltd. v. MCD*) where the plea of MCD that OAP, 2007

extended only up to page 22 of the brochure containing the OAP was accepted by the Court. The case of MCD was that what is found thereafter in the brochure, including the arbitration clause, did not form part of the OAP. He also referred to a decision dated 19th January, 2017 of this Court in W.P.(C) No. 5274/2016 where the Petitioner in that case, M/s Outdoor Associates, had on the basis of the above decision in *Sports & Leisure Apparel Ltd. v. MCD*, taken a stand that there is no arbitration clause even in the OAP.

15. Mr Khanna sought to place reliance on the decision of the Supreme Court in *Chloro Controls India Private Limited v Severn Trent Water Purification Inc. (2013) 1 SCC 641*. He urged that when there were multiple agreements signed between different parties, some containing an arbitration clause and others not, the disputes arising from all of them could be referred to arbitration.

16. The Court does not consider it necessary to express any opinion on the above contention at this stage. The Court only would like to observe that as of date, no notice invoking the arbitration clause has been sent as yet by EMPL to SDMC raising a specific claim *qua* each of the sites other than at Ashram. Mr Poddar, at this stage, stated that as and when such notices are sent, SDMC will consider it with the seriousness it deserves and take a decision on such request, one way or the other, without unnecessary delay. It will always be open to EMPL thereafter to seek appropriate reliefs in accordance with law. The contentions of both the parties on this aspect are left open to be urged in other appropriate proceedings.

17. No further directions are called for at this stage in this petition (Arb. Petition No.638/2016) except to the extent as indicated hereinabove in respect of the disputes arising from the agreement concerning the unipole at Ashram.

18. The petition is disposed of accordingly. The pending application is also disposed of.

S.MURALIDHAR, J

FEBRUARY 17, 2017

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