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

+ **ARB.P. 772/2016**

M/S. MEENA ADVERTISERS

..... Petitioner

Through: Mr Pranjal Kishore and Mr Anil
Kumar Mishra, Advocates.

versus

DELHI METRO RAIL CORPORATION LTD. Respondent

Through: Mr R.V. Sinha with Mr Sanjay
Kumar, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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09.01.2017

1. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') praying that an Arbitrator be appointed to adjudicate the disputes that have arisen between the parties in relation to the agreement dated 10.12.2014.
2. The said agreement includes an arbitration clause, which is set out below:-

“14.0 Dispute Resolution

14.1 Arbitration: All disputes relating to this agreement or claims arising out of or relating to this agreement or breach, termination or the invalidity thereof or on any issue whether arising during the progress of the services or after the completion or abandonment thereof or any matter directly or indirectly connected with this agreement shall be referred to Arbitrator(s) appointed by Director, DMRC on receipt of such request from either party. Matters to be arbitrated upon shall

be referred to a sole Arbitrator if the total value of the claim is upto Rs.50 Lakhs and to a panel of three Arbitrators, if total value of claim is more than Rs.50 Lakhs. DMRC shall provide a panel of three Arbitrators which may also include DMRC officers for the claims upto Rs.50 Lakhs and a panel of five Arbitrators which may also include DMRC officers for claims of more than Rs.50 Lakhs. Licensee shall have to choose the sole Arbitrator from the panel of three and/or one Arbitrator from the panel of five in case three Arbitrators are to be appointed. DMRC shall also choose one Arbitrator from this panel of five and the two so chosen will choose the third Arbitrator from the panel only. The Arbitrator(s) shall be appointed within a period of 30 days from date of receipt of written notice/demand of appointment of Arbitrator from either party.”

3. The petitioner invoked the arbitration clause by its letter dated 25.11.2015. The respondent responded to the aforesaid letter by its letter dated 28.12.2015 proposing names of five persons in terms of the arbitration clause and called upon the petitioner to intimate the name of one Arbitrator within a period of seven days from the said letter. In response to the aforesaid, the petitioner sent a letter dated 28.01.2016 requesting that a former Judge of the Supreme Court or High Court be appointed as an Arbitrator.
4. In response to the above, the respondent once again sent another letter dated 15.02.2016 referring to the arbitration clause and unequivocally stating that the petitioner’s suggestion that a former judge of the Supreme Court or High Court be appointed as an Arbitrator was not acceptable to the respondent. The respondent once again suggested names of five persons out of which two were common with the earlier list.
5. The petitioner did not select any of the names as suggested by the

respondent as required in terms of the arbitration Clause and once again requested that a former judge be appointed as an Arbitrator.

6. The learned counsel appearing for the petitioner submits that since an Arbitral Tribunal has not been constituted within a period of 30 days of the petitioner invoking the arbitration clause, the respondent has forfeited its right for participating in the constitution of an Arbitral Tribunal and an Arbitral Tribunal be constituted by this Court. He has further relied on a decision of the Supreme Court in **Deep Trading Company v. Indian Oil Corporation and Ors. (2013) 4 SCC 35** and has drawn the attention of this Court to paragraph nos. 17 and 18 of the said judgment. On the strength of the same, he contended that this Court would have the discretion to appoint an Arbitrator and while doing so shall have due regard to the qualifications required as well as other considerations as are likely to secure an appointment of an independent Arbitrator. Further it is not necessary that the Arbitrator named in the arbitration clause must be appointed.

7. The contentions advanced by the petitioner are bereft of any merit. The respondent had responded to the petitioner's request for arbitration in terms of the arbitration clause. The learned counsel appearing for the respondent states that none of the persons named in the letter dated 15.02.2016 were employees of the respondent corporation. Thus, it is not possible to accept that, *ex facie*, any of the persons mentioned in the said letter were disqualified to act as such in terms of Section 12(5) of the Act.

8. Be that as it may, the endeavour of the petitioner is to resile from the agreed arbitration clause, which cannot succeed. The arbitration clause specifies the procedure for appointment of the Arbitral Tribunal and therefore, the same has to be followed.

9. The decision of the Supreme Court in *Deep Trading Company v. Indian Oil Corporation and Ors.* (*supra*) is also of no assistance to the petitioner since respondent has not forfeited its right to participate in the appointment of Arbitral Tribunal and therefore, the petition under Section 11 of the Act is not maintainable. It is clear that the petitioner has obstructed the appointment of the Arbitral Tribunal by not adhering to the agreed procedure; thus the petitioner cannot make a grievance of non-appointment of the Arbitrators. It is also relevant to observe that the respondent is ready and willing to proceed with appointment of the Arbitral Tribunal in accordance with the arbitration clause and in furtherance of its communication dated 15.02.2016.

10. Undoubtedly, if the respondent had failed to act in terms of the arbitration clause prior to the petition being moved, the respondent would have forfeited its right to do so. However, in this case, it is clear that there is no delay on the part of the respondent in responding to the petitioner's request for arbitration and the delay, if any, is caused solely by the petitioner.

11. The petition is, accordingly, dismissed.

12. *Dasti.*

VIBHU BAKHRU, J

JANUARY 09, 2017
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