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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 25th April, 2018

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ARB.P. 88/2018

M/S SAM (INDIA) BUILDWELL PVT .LTD. THROUGH ITS
REGIONAL HEAD AND AR KARAN SAGAR AGGRWAL

..... Petitioner

Through: Mr.Vivekanand, Adv.

versus

M/S COSLIGHT INDIAN TELECOM PVT LTD THROUGH ITS
MANAGING DIRECTOR

..... Respondent

Through: Mr.Sanjay Kr. Singh, Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') seeking appointment of a Sole Arbitrator to adjudicate the disputes that have arisen between the parties in relation to the Agreement dated 8th December, 2010 executed between the parties.
2. Clause 1 of the agreement incorporates the General Conditions of the Contract (GCC) as a part of the agreement.
3. Clause 22 of the GCC provides for resolution of the disputes through arbitration. The relevant extracts from the Arbitration Agreement are as under:-

CLAUSE 22	
Settlement of Disputes & Arbitration	<i>Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications design, drawings and instructions here-in before mentioned and as to the quality of workmanship or materials used on 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, instruction, offers 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 cancellation, permission, completion or abandonment thereof shall be dealt with as mentioned hereinafter:</i> i) xxxxxxxxxxxx
	ii) <i>Except where the decision has become final and conclusive in terms of Sub-Para (i) above disputes or difference shall be referred for adjudication through arbitration by sole arbitrator appointed by the administrative head of the said EMPLOYER. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute alongwith the notice for appointment of arbitrator and giving reference to the rejection by the Managing Director EMPLOYER of the appeal. It is also a term of this contract that no person other than a person appointed by the administrative head of the EMPLOYER as aforesaid should act as arbitrator and if for any reason that is not possible</i>

	<u>the matter shall not be referred to arbitration at all.</u> <i>It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Architect 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 EMPLOYER shall be discharged and released of all liabilities under the contract in respect of these claims.</i> <i>The arbitration shall be conducted in accordance with the provisions of the Arbitration and conciliation Act, 1996 (26 of 1996) or any statutory modification or re-enactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceeding under this clause.</i> <i>It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs.1,00,000 the arbitrator shall give reasons for the award.</i> <i>It is also a term of the contract that if any fees are payable to the arbitrator these shall be paid equally by both the parties.</i> <i>It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published be paid half and half</i>
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	<i>by each of the parties. The cost of the reference and of the award (including the fees, if any of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid.</i>
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(Emphasis supplied)

4. As disputes arose between the parties, the petitioner vide its notice dated 24th October, 2017 invoked the Arbitration Agreement between the parties and requested the respondent to appoint an arbitrator. Having received no response thereto, the petitioner reiterated its request vide letters dated 14th November, 2017 and 28th November, 2017. As no response thereto was received by the petitioner, the present petition was filed.

5. The respondent does not deny the existence of the Arbitration Agreement. Its objection to the present petition is twofold. It is firstly contended that this Court would lack territorial jurisdiction to entertain the present petition, inasmuch as clause 8 of the Special Conditions of the Contract (SCC) provides that the Courts at Una (Himachal Pradesh) alone shall have the jurisdiction over the dispute.

6. Counsel for the petitioner, however, draws my attention to Clause 8 of the Agreement dated 8th December, 2010, which is reproduced herein below:

“8) The contractor hereby acknowledges that time is the essence of the contract.

1. All disputes arising out of or in any way connected with this agreement shall be deemed to have arisen in New Delhi and

only the courts in the state of New Delhi shall have jurisdiction to determine the same.”

7. In my opinion, as the specific contract between the parties vests jurisdiction in this Court and also taking into account the fact that the agreement between the parties has been executed at New Delhi, this Court would have the jurisdiction to entertain the present petition. Though there is no clause providing for precedence amongst the documents referred to in the agreement, in my opinion a specific term of the agreement agreed to between the parties would prevail over the General Condition of Contract or the Special Condition of Contract which is in a printed form and gets incorporated merely by way of a reference. It is important to note that this incorporation of GCC or SCC is also for the entire document and not to any specific clauses thereof.

8. In this regard, reference can also be made to the judgment of the Supreme Court in ***M.K.Abraham & CO. Vs. State of Kerala & Anr.*** 2009 (3) RAJ 459(SC), wherein the Supreme Court held that the printed form contains standard terms to suit all contracts and situations; it is not drawn with reference to the special feature of a specific contract; when such a standard form is used with reference to a specific contract, it becomes necessary to modify the standard/general terms by making additions/alterations/deletions, to provide for the special features of that contract. Paragraph 10 of the above judgment is quoted herein below:-

“10. If a contract consists of a printed form with cyclostyled amendments, typed additions and deletions and handwritten

corrections, an endeavour shall be made to give effect to all the provisions. However, in the event of apparent or irreconcilable inconsistency, the following rules of construction will normally apply:

- (i) The cyclostyled amendments will prevail over the printed terms*
- (ii) The type-written additions will prevail over the printed terms and cyclostyled amendments:*
- (iii) Hand written corrections will prevail over the printed terms, cyclostyled amendments and typed written additions.*

*The above rules have evolved from the well known maxim of construction that “written, stamped or typed additions, when inconsistent with the printed terms, would normally prevail over the printed terms” and proceeds on the assumption that the printed form contained the original terms, and changes thereto were incorporated by the cyclostyled amendments, followed by changes by type-written additions and lastly the hand written additions. The logical explanation for such assumption is this: The printed form contains standardised terms to suit all contracts and situations. It is not drafted with reference to the special features of a specific contract. When such a standard form is used with reference to a specific contract, it becomes necessary to modify the standard/general terms by making additions/alterations/deletions, to provide for the special features of that contract. This is done either by way of an attachment of an annexure to the standard printed form, incorporating the changes, or by carrying out the required additions/alterations /deletions in the standard form itself. Such additions/alterations/deletions are done by typing/stamping/hand. We may refer to the following oft-quoted enunciation of the legal position by Lord Ellenborough in *Robertson v. French*, 1803-13 All ER Rep. 350 with reference to printed form of contract with hand-written additions:*

“..... that the words super added in writing are entitled, nevertheless, if there should be any reasonable doubt on the

sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning and the printed words are a general formula adapted equally to their case and that of all other contracting parties on similar occasions and subjects.”

Another parallel principle that is equally relevant is that where the contract has several annexures/attachments, prepared at different points of time, unless a contrary intention is apparent, the latter in point of time would normally prevail over the earlier in point of time.”

9. In the present case, the parties having executed a specific agreement for vesting exclusive jurisdiction in this Court, reliance of the respondent on the standard printed conditions, in my opinion, cannot be sustained for excluding the jurisdiction of this Court to adjudicate the present petition.

10. The second objection raised by the respondent to the maintainability of the present petition is by relying upon clause 22(ii) of the GCC which *inter alia* provides that the Arbitrator shall be appointed by the Managing Director of the respondent and that no person other than the person appointed by the Administrative Head of the respondent should act as an Arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

11. Counsel for the respondent, relying upon the above term of the GCC, submits that the arbitrator can be appointed only by the Managing Director of the respondent and not by this Court. He further submits that no other person can act as an Arbitrator and in failure thereof the arbitration clause itself would not be enforceable.

12. I am unable to agree with the above submission of the counsel for the respondent. The Arbitration Agreement between the parties is contained in the first part of clause 22 of the GCC which states that all questions and disputes relating to the meaning of the specifications, design drawings and instructions etc., whether arising during the progress of the work or after cancellation or completion thereof shall be referred for adjudication through arbitration. The second part of Clause 22 prescribes that such Arbitrator is to be appointed by the Managing Director of the respondent. However, this second part is only a procedure of the appointment and incase the Managing Director of the respondent fails to appoint an Arbitrator the petitioner cannot be denied recourse to Section 11 of the Act for seeking appointment of an Arbitrator. In fact, this Court will have the power to appoint an Arbitrator under Section 11(6)(a) only where the respondent fails to act as required under the appointment procedure. The respondent having lost its right to appoint an arbitrator in terms of the Arbitration Agreement, cannot plead discharge of the Arbitration Agreement for its own default.

13. In ***Indian Oil Corporation Ltd. & Ors. Vs. M/s Raja Transport (P) Ltd.*** 2009 (4) RAJ 53 (SC), the Supreme Court, had held that such a condition in the Arbitration Agreement interferes with the power of the Court under Section 11 of the Act and is liable to be ignored being contrary to the Act. Para 20 of the said judgment is quoted hereinbelow:-

“20. This takes us to the effect of the condition in the arbitration agreement that “it is also a term of this contract

that no other person other than the Director, Marketing or a person nominating by such Director, Marketing of the Corporation as aforesaid shall act as Arbitrator. "Such a condition interferes with the power of the Chief Justice and his designate under section 11(8) of Act to appoint a suitable person as arbitrator in appropriate cases. Therefore, the said portion of the arbitration clause is liable to be ignored as being contrary to the Act. But the position will be different where the arbitration agreement names an individual (as contrasted from someone referred to by designation) as the Arbitrator. An example is an arbitration clause in a partnership deed naming a person enjoying the mutual confidence and respect of all parties, as the Arbitrator. If such an arbitration agreement provides that there shall be no arbitration if such person is no more or not available, the person named being inextricably linked to the very provision for arbitration, the non-availability of the named arbitrator may extinguish the very arbitration agreement. Be that as it may. "

14. In ***Nandyal Co-op. Spinning Mills Ltd. vs. K.V.Mohan Rao*** (1993) 2 SCC 654, the Supreme Court, considering Section 8 of the Arbitration Act, 1940 had held as under:-

"11. It would thus be clear that if no arbitrator had been appointed in terms of the contract within 15 days from the date of the receipt of the notice, the Administrative Head of the appointment had abdicated himself of the power to appoint arbitrator under the contract. The court gets jurisdiction to appoint an arbitrator in place of the contract by operation of Section 8(1)(a). The contention of Sri Rao, therefore, that since the agreement postulated preference to arbitrator appointed by the Administrative Head of the appellant and if he neglects to appoint, the only remedy open to the contractor was to have recourse to civil suit is without force. It is sign that under the contract the respondent contracted out from adjudication of his claim by a civil court. Had the contract provided for appointment of a named arbitrator and the named person was

not appointed, certainly the only remedy left to the contracting party was the right to suit. That is not the case on hand. The contract did not expressly provide for the appointment of a named arbitrator. Instead power has been given to the Administrative Head of the appellant to appoint sole arbitrator. When he failed to do so within the stipulated period of 15 days enjoined under Section 8(1) (a), then the respondent has been given right under clause 65.2 to avail the remedy under Section 8(1)(a) and request the court to appoint an arbitrator. If the contention of Sri Rao is given acceptance, it amounts to put a premium on inaction depriving the contractor of the remedy of arbitration frustrating the contract itself. ”

15. In **TRF Ltd. vs. Energo Engineering Projects Ltd.**, (2017) 8 SCC 377, the Supreme Court held that an arbitration clause may be divided into various parts; one providing for the adjudication of the disputes through an arbitrator, while the other relating to the procedure of appointment of the arbitrator. The Arbitration Agreement providing for the resolution of disputes through arbitration being separate from its procedure of appointment, would survive the failure of the party to adhere to the procedure of appointment and the Court can appoint an Arbitrator on such failure of the party.

16. In view of the above, I find no merit in the objection raised by the counsel for the respondent to the appointment of an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the agreement dated 8th December, 2010.

17. In view of the above, I appoint **Ms. Indermeet Kaur**, (R/o 62, Lodhi Estate, New Delhi-110003), Former Judge of this Court, as a Sole Arbitrator to adjudicate the disputes that have arisen between the parties. The Arbitrator shall give her disclosure under Section 12(1)

of the Act before proceeding with the reference. The arbitration shall be conducted under the aegis of Delhi International Arbitration Centre (DIAC) and its Rules.

18. The petition is allowed in the above terms with no order as to costs.

Dasti.

NAVIN CHAWLA, J

APRIL 25, 2018

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