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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 11th January, 2018

Pronounced on: 19th January, 2018

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O.M.P. (T) (COMM.) 71/2017, IA No.10366/2017

CRAYONS ADVERTISING PRIVATE LIMITED Petitioner

versus

BHARAT SANCHAR NIGAM LIMITED Respondent

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O.M.P. (T) (COMM.) 79/2017, IA No.11697/2017

CONCEPT COMMUNICATIONS LIMITED Petitioner

versus

BHARAT SANCHAR NIGAM LIMITED Respondent

Appearance : Mr.Jayant Mehta, Mr.Aman Varma, Ms.Ansula Grover, Mr.Parth Singh Chandhari and Mr.Shaurya Kuthila, Advocates for the petitioner.

Mr.L.B.Rai, Mr.Sumit Nagpal and Mr.Mohit Kr. Sharma, Advocates for the respondent.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

O.M.P. (T) (COMM.) 71/2017

1. The petitioner has filed this petition (O.M.P. (T) (COMM.) No.71/2017) under Section 15 (2) of the Arbitration and

Conciliation Act, 1996 (hereinafter referred as 'the Act') for declaring the mandate of the sole arbitrator Mr.Rakesh Kumar in the arbitral proceedings titled *M/s Crayons Advertising Private Limited vs Bharat Sanchar Nigam Limited* pending between the parties stood terminated by efflux of time and consequential appointment of the new arbitrator.

2. The petitioner and the respondent are the parties to an agreement dated 17.09.2009 executed between them at New Delhi which provide for resolution of disputes between them arising under the agreement through the arbitration of a sole arbitrator, per its clause 12.

3. Since the disputes arose the petitioner invoked the arbitration clause vide its letter dated 12.04.2013. In pursuance of the same, the respondent had vide its letter dated 03.02.2014 appointed Mr.S.C. Choudhary as the sole arbitrator and before him the proceedings were held till 10.11.2016 when he rescued himself. The pleadings were completed by then and the cross examination of the petitioner witness was underway.

4. Mr.Rakesh Kumar, then was appointed as an arbitrator by the respondent vide letter dated 13.11.2016. As per the directions of Mr.Rakesh Kumar, arbitrator, the parties gave their consent to conduct the proceedings under Section 29 (B) of the Act on the basis of the pleadings and documents on record; viz *fast track proceedings*. The consent to conduct the proceedings under

Section 29(B) of the Act was given by the petitioner on the premise no further documents remains to be filed by the parties which would require rebuttal by leading evidence or cross examination of the witnesses.

5. Pursuant to an order of Shri Rakesh Kumar, the learned arbitrator, the petitioner filed its written arguments on 16.03.2017; and on 23.05.2017 but accompanied with documents not forming part of the record. The petitioner raised an objection qua the fresh filing of documents *inter alia* on the ground the same were disputed and cannot be permitted to be filed at the stage of final hearing. Nevertheless the respondent kept on filing documents at each date of hearing i.e. 23.05.2017, 07.07.2017, 24.08.2017. The petitioner had serious disputes qua the authenticity and veracity of the documents and its contents.

6. The learned arbitrator without adjudicating upon the objections raised by the petitioner rather held in an order dated 30.05.2017 *if during the course of arguments any document is found to be afterthought / irrelevant the same shall not be allowed be to taken on the record*. The learned arbitrator rather failed to take cognizance of the objections raised by the petitioner viz. the respondent cannot be permitted to rely upon the documents filed at the stage of the arguments in a proceedings under Section 29(B) of the Act.

7. The mandate of the learned arbitrator expired on 30.05.2017 and the petitioner did not give its consent and rather filed an application dated 25.08.2017 intimating the mandate of the learned arbitrator stood terminated by efflux of time and further recorded its disinclination to consent for extension of time period for making the award. The application dated 25.08.2017 filed by the petitioner was opposed by the respondent and the proceedings were adjourned for 12.09.2017.

8. The petitioner alleged since the arbitral proceedings were being conducted per Section 29(B) of the Act (Amended Act) and since the period of six months for making an award under Section 29(B) of the Act has come to an end; so no award can be made or published by the learned arbitrator as the mandate of the learned arbitrator has come to an end by efflux of time, hence, this petition.

9. The learned counsel for the respondent argued since the petitioner continued to appear before the learned arbitrator even after 30.05.2017, thus by his conduct had impliedly given its consent to continue with the proceedings and hence per Section 29(A) (iii) of the Act the period of conducting the arbitral proceedings got automatically extended by further six months.

10. Even if this argument of the respondent is accepted then also such period of six months had since expired on 30.11.2017 and thereafter no consent is given by the petitioner to extend the mandate of the learned arbitrator. Thus, in any case the mandate of

the learned arbitrator has come to an end on 30.11.2017 hence a new arbitrator needs to be appointed.

11. Further, the manner in which the learned arbitrator conducted the proceedings do show that he is indecisive and could not decide objections raised from time to time and kept on allowing the respondent to file documents despite the proceedings were being conducted under Section 29 (B) of the Act. His decision to consider the documents at the stage of final arguments either to accept or reject those could have caused serious prejudice to the petitioner who shall then have no time to rebut such documents, the veracity and contents thereof the petitioner is disputing.

12. Thus, I may only say since the period for pronouncing the award has expired lately on 30.11.2017 and not being extended with the consent of both the parties, the mandate of Mr.Rakesh Kumar stood terminated. The plea raised by the respondent viz the invocation being under the old Act- Section 29 (A) would not be applicable is frivolous in view of clause 12.2 of the Agreement which read as under:-

“12. Arbitration

12.1. xxxx

12.2 The arbitrator may from time to time with the consent of both enlarge the time for making and publishing the award subject to the aforesaid Arbitration and Conciliation Act, 1996 and the rules made thereunder any modification thereof for the time being

in force shall be deemed to apply to the arbitration proceedings under this clause.”

13. Hence, the amendment would automatically apply and per Section 29 (A) of the Act the parties need to give consent to extend the period of arbitration.

14. Another objection raised by the learned counsel for the respondent is if the Court concludes the mandate of Sh.Rakesh Kumar has been terminated then yet again the same procedure for appointment of the arbitrator as was initially adopted would again be followed in view of Section 15 (2) of the Act.

“15. Termination of mandate and substitution of arbitrator.—

(1) xxx

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.”

15. It is submitted the learned arbitrator needs to appointed as per Section 12.1 of the Agreement which read as under:-

“12. Arbitration

12.1 In the event of any question, disputes or differences arising under this agreement or in connection therewith (except as to the matters, the decision to which is specifically provided under this agreement), the same shall be referred to the sole arbitration of the CMD, BSNL, or in case of his designation is changed or his office of abolished, then in such cases to the sole arbitration of the officer for the time being

*entrusted (whether in addition to his own duties or otherwise) with the functions of the CMD, BSNL or by whatever designation as an officer may be called (hereinafter referred to as the said officer), and if the CMD, or the said officer is unable or unwilling to act as such, then to the sole arbitration of **some other person appointed by the CMD, or the said officer.** The agreement to appoint an arbitrator will be in accordance with the Arbitration and Conciliation Act 1996.*

There will be no objection to any such appointment on the ground that the arbitrator is a Government Servant or that he has to be deal with the matter to which the agreement relates or that in the course of his duties as a Government Servant he has expressed his views on all or any of the matters in dispute. In the event of such an arbitrator to whom the matter is originally referred, being transferred or vacating his office or being unable to act for any reason whatsoever, the CMD, BSNL Board or the said officer shall appoint another person to act as an arbitrator in accordance with terms of the agreement and the person so appointed shall be entitled to proceed from the stage at which it was left out by his predecessors.”

16. The appointment of arbitrator by CMD or by his nominee has been held to be invalid per *TRF Limited vs Energo Engineering Projects Limited* AIR 2017 SC 3889. The respondent's counsel do not dispute this proposition of law.

17. Similar is the position in O.M.P. (T) (COMM.) 79/2017.

18. Hence, in the circumstances, Shri Rakesh Sidharth, Retired District Judge (Mobile No.9910384655) is hereby appointed as arbitrator to continue with the proceedings between the parties. He shall conduct the arbitration under the aegis of DIAC and shall charge fee as per the schedule of DIAC. Necessary declarations to be made.

19. The petition stands disposed of in terms of above.

YOGESH KHANNA, J

JANUARY 19, 2018

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